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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 717.

LOUISVILLE JOINT STOCK LAND BANK,
Petitioner,

against

WILLIAM W. RADFORD, SR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF PETITIONER LOUISVILLE JOINT STOCK LAND BANK.

JOHN W. DAVIS,
WM. MARSHALL BULLITT,
JOHN E. TARRANT,
Counsel for Petitioner.

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LOUISVILLE JOINT STOCK LAND BANK,
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against

WILLIAM W. RADFORD, SR.,
Respondent.

No. 717.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF ON BEHALF OF LOUISVILLE JOINT STOCK LAND BANK.

Opinions Below.

Louisville Joint Stock Land Bank v. *Radford*, 8 F. Supp. 489 (D. C.) [R. 52-67]; 74 Fed. (2) 576 (C. C. A. 6th) [R. 101-112].

Jurisdiction.

Certiorari was granted on March 4, 1935 under Judicial Code § 240(a), as amended by the Act of February 13, 1925.

Questions Presented.

The only question presented is the constitutionality of subsection (s), known as the Frazier-Lemke Act of June 28, 1934 [48 Stat. 1289], which was added as an amendment to Section 75 of the Bankruptcy Act [47 Stat. 1470].

This includes three considerations:

1. Whether subsection (*s*) (7) is within the power of Congress to establish uniform laws "on the subject of bankruptcies."

2. Whether a mortgagee is entitled to have the mortgaged property applied to the payment of his claim, or, whether Congress can authorize the mortgagor to keep the property, and compel the mortgagee to surrender his lien and to accept in lieu thereof an appraised value which need not be the "market value" of the property.

3. Whether subsection (s) (7) is so arbitrary, capricious and unreasonable that it is incompatible with fundamental law and violates the "due process" clause of the Fifth Amendment.

Statutes Involved.

The statutes involved are set forth in Appendix A* (p. 54 *infra*).

On March 3, 1933, the Bankruptcy Act (§ 75) entitled "AGRICULTURAL COMPOSITIONS AND EXTENSIONS" provided that at any time before March 3, 1938, any *bona fide* farmer or other individual "the principal part of whose income is derived from farming operations" (i. e. *absentee landlord*), may file a petition stating that he is "unable to meet his debts as they mature" and desires "to effect a composition or an extension of time to pay his debts"—with appropriate

* The Frazier-Lemke Act is not only full of perplexing ambiguities, but it omits much that is essential to a self-speaking statute. The Courts which have considered it have been forced to resort freely to judicial interpolation (*Cf. In re Miner*, 9 F. Supp. 1).

President Roosevelt's prepared statement to the press at the time of signing the Frazier-Lemke bill contained the following observation:

> "The bill is in some respects loosely worded and will require amendment at the next session of Congress. Nevertheless, the reasons for signing it far outweigh the arguments on the other side."—N. Y. Times, June 30, 1934.

provisions for proposing and carrying into effect a composition or extension.

On June 28, 1934, § 75 was amended by the addition of the Frazier-Lemke Act [§ 75 (s)] which provided that any farmer (or absentee landlord) (1) who could not get his creditors to agree to the composition or extension, or (2) even if they had agreed thereto, who had changed his mind and desired to repudiate the composition or extension previously made, might avail himself of the privileges granted by the Frazier-Lemke Act.

In such a case the farmer may ask to be adjudged a bankrupt, and have his property appraised,

> "at its then fair and reasonable value, not necessarily the market value at the time of such appraisal" [Section 75 (s) (1)].

If the mortgagee will *not* voluntarily consent to sell the mortgaged property back to the farmer at the appraised value upon six years' credit on the easy terms fixed by the Act, then *automatically*

(*a*) The Bankruptcy Court shall *stay all proceedings for five years*; during this entire period the farmer *shall retain possession* of any part of the property which he desires; *provided*, he annually pays into court a reasonable rental therefor.

(*b*) At any time within the five years, the farmer (at his option) may obtain full possession and title to the property by paying into court either (1) its original appraised price, or (2) in the case of mortgaged real estate, at the option of the lienholder, a reappraised price of the mortgaged land.

(*c*) If the farmer pays the price he may apply for his discharge in bankruptcy; but if he fails to pay, the Court may order the mortgaged property sold.

The Frazier-Lemke Act only applies to debts existing on June 28, 1934 [subsection (s) (7)].

We are especially concerned with subsection (s) (7) of the Frazier-Lemke Act (48 Stat. 1291) which reads as follows:

> "(7) If any secured creditor of the debtor, affected thereby, shall file written objections to the manner of payments and distribution of debtor's property as herein provided for, then the court, after having set aside the debtor's exemptions as prescribed by the State law, shall stay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession; the first payment of such rental to be made within six months of the date of the order staying proceedings, such rental to be distributed among the secured and unsecured creditors, as their interests may appear, under the provisions of this Act. At the end of five years, or prior thereto, the debtor may pay into court the appraised price of the property of which he retains possession: *Provided,* That upon request of any lienholder on real estate the court shall cause a reappraisal of such real estate and the debtor may then pay the reappraised price, if acceptable to the lienholder, into the court, otherwise the original appraisal price shall be paid into court and thereupon the court shall, by an order, turn over full possession and title of said property to the debtor and he may apply for his discharge as provided for by this Act; *Provided, however,* That the provisions of this Act shall apply only to debts existing at the time this Act becomes effective.
>
> If the debtor fails to comply with the provisions of this subsection, the court may order the trustee to sell the property as provided in this Act."

Statement of the Case.

In 1922-24, Radford borrowed $9,000 from the Louisville Joint Stock Land Bank, mortgaging his 170-acre Kentucky farm (appraised on the statutory* basis at $18,000), its rents, issues and profits, to secure the payment thereof, and agree-

* 39 Stat. 370.

ing to pay all taxes and keep up $1,000 fire insurance (R. 16, 18-33).

Radford defaulted in various payments due from September 1, 1932, through March 1, 1934; failed to pay the 1931-1933 taxes; and refused to keep up the insurance (R. 24, 33, 34).

Being a Joint Stock Land Bank organized under the Federal Farm Loan Act of 1916 [39 Stat. 360] petitioner Bank attempted to give every consideration to effecting the announced policies of the Roosevelt administration consistent with the needs and security of the other interested farmers. The Bank repeatedly, but without avail, urged Radford to refinance his indebtedness pursuant to the provisions of the Emergency Farm Mortgage Act of 1933* [48 Stat. 41] (R. 41-3).

On June 5, 1933, the Land Bank finally accelerated the notes and mortgages; and on June 23, 1933, instituted a foreclosure suit in a Kentucky State Court (R. 34).

In September-October, 1933, the State Court denied the Bank's motions for the appointment of a receiver and for judgment in the foreclosure suit, in order to allow Radford time to seek a composition and extension of his debts under Section 75 (R. 42).

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* This Act empowered Federal Land Banks and the Land Bank Commissioner to lend farmers seventy-five per cent of the *normal*, not the market, value of their land with *no repayment of principal for five years* and at 4½% interest for the first five years and 5% thereafter.

Normal value was defined by Mr. Rice, President of the Federal Land Bank of Louisville, speaking for the Farm Credit Administration on October 10, 1933, before the American Life Convention, as follows (Report of 1933 American Life Convention):

> *"Normalcy is that value placed upon land based upon the price of commodities for the period of 1909 to 1914.* We loan upon the earning power of land, and in arriving at normalcy we use the price of wheat for 1909 to 1914 of ninety cents in this section, sixty-five cents for corn, about seven cents for hogs and other products and commodities in their proportion. * * *
>
> *"When we loan 75% therefore of normalcy,* in combining the two loans you can readily see that *we have loaned from 97% to 105% of the present value of the land.* * * *"*

Cf. § 2 of the Agricultural Adjustment Act [48 Stat. 32].

On February 26, 1934 (after repeated refusals to cooperate with the Bank in refinancing his mortgage), Radford filed his petition under Section 75(c) (R. 8-9, 43).

In April, 1934, the *Bank offered to accept from Radford a deed to the mortgaged property in full satisfaction of the $9,000 indebtedness due the Bank,* and to assume all unpaid taxes. Radford agreed to execute such a deed but refused to do so when the Bank presented the prepared deed to him to be signed (R. 43).

On June 30, 1934, the State Court entered a judgment of foreclosure, ordered the sale of the property, and the Bank thereupon took steps to have the property advertised for sale (R. 43-7).

On August 6, 1934, and again on November 10, 1934 (before the property could be sold under the State Court decree), Radford amended his original petition under Section 75 and invoked the provisions of the Frazier-Lemke Act (R. 11, 102).

The Bank intervened, praying that the Frazier-Lemke Act be declared unconstitutional, and that the Bank be allowed to pursue its remedies in accordance with the judgment of the State Court (R. 15-49).

On November 14, 1934, the District Court held that the Frazier-Lemke Act was constitutional, adjudged Radford a bankrupt, and referred the cause to a referee to take the further proceedings authorized thereby (R. 51).

Upon Radford's request, the referee appointed appraisers and directed them to appraise all of Radford's property pledged, encumbered or unencumbered, "at its then fair and reasonable value, not necessarily the market value". The appraisers fixed the value of the mortgaged property at $4,445 (R. 67, 69-70).*

---

* In his schedule, Radford fixed it at $4,450. In his Brief in the District Court (p. 2) it is said: "So that land worth $18,000 in 1924 has become reduced ten years later to a value of $6,700 * * *".

The Bank in open court *offered to pay $9,205.09 in cash for the property mortgaged to it* (R. 71). But the referee approved the appraisal, fixed the value of the mortgaged property at $4,445 (R. 72) and ordered that Radford should remain in possession of the mortgaged property (R. 74-5).

The Bank refused to consent to a sale of the mortgaged property to Radford at the $4,445 appraised value, upon the easy six-year credit terms of subsection (s) (3) (R. 76, 78).

Thereupon, the referee, in accordance with the mandate of subsection (s) (7), ordered that (R. 80):

> (1) All proceedings against Radford for the enforcement of *any* lien against the mortgaged property *be stayed for five years;*
>
> (2) The Bank be enjoined for five years from proceeding in any court to enforce its lien; and
>
> (3) Radford should retain possession of the mortgaged property for five years, provided he paid $325 on May 1, 1935 (i. e. in six months) as rental for the first year and paid a rental to be fixed by the Court for subsequent years. Of this sum, $105 must be expended on taxes and insurance on the mortgaged property (R. 80). [Parenthetically it should be noted that from the remaining $220 nominally "to be distributed among the secured and unsecured creditors, as their interests may appear," administration expenses are to be deducted, leaving little, if anything, to the Bank in the form of a cash rental payment.]

Decisions Below.

The District Court approved the action of the referee in entering each of the orders, and upheld the Act (R. 51-67; 85-86).

The Bank then appealed to the Circuit Court of Appeals for the Sixth Circuit (R. 82-4, 86, 88-90, 93-98).

The Circuit Court of Appeals affirmed the decree below (R. 100); and held that the bankruptcy power comprehended "every phase of the relations between an insolvent or *non-paying* or fraudulent debtor and his creditors, extending to his or their relief" (R. 107); and that Congress could compel a secured creditor to accept an *appraised value* of the mortgaged property while permitting the debtor to keep such property, free and clear of the lien (R. 101-112).

Specifications of Error.

The ultimate error is that the Circuit Court of Appeals erred in holding the Frazier-Lemke Act constitutional (R. 94-96).

Summary of Argument.

1. The Frazier-Lemke Act is not a law "on the subject of bankruptcies"; does not deal with any subject over which power is delegated to Congress; and is, therefore, in contravention of the Tenth Amendment (p. 9, infra).

2. The Frazier-Lemke Act deprived the Land Bank of its property without due process of law by denying the Land Bank its fundamental right to have the mortgaged property applied to the payment of its debt (p. 24, infra).

3. The Frazier-Lemke Act contains provisions so unreasonable, capricious and arbitrary that the Land Bank is deprived of its property without due process of law (p. 34, infra).

4. The Frazier-Lemke Act cannot be sustained on any doctrine related to an emergency (p. 51, infra).

POINT I.

The Frazier-Lemke Act is not a law "on the subject of bankruptcies"; does not deal with any subject over which power is delegated to Congress; and is, therefore, in contravention of the Tenth Amendment.

The Acts of March 3, 1933 (Section 75 as originally enacted), and of June 28, 1934 (the Frazier-Lemke Act), purport to be amendments to the Bankruptcy Act. There is no other possible constitutional basis for them. Unless they are *bankrupt laws in fact* and *not merely by label* they are unconstitutional. This proposition, we believe to be self-evident and incontrovertible.

Until the Frazier-Lemke Act, the essential features of bankruptcy law were: *First,* on the part of the debtor—a surrender of his property and its ratable *distribution* among his creditors; and, *second,* on the part of the creditors—discharge of all claims against the debtor after distribution.

In recent months there has been abroad in the land the erroneous doctrine* that the "subject of bankruptcies" in

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* See *In re Burgh, In re Parmenter,* 7 F. Supp. 184; *In re Landquist, In re Parmenter,* 70 F. (2d) 929, cert. den., 55 Sup. Ct. 98, sub. nom. *Hardenbrook* v. *Landquist; In re Chicago, R. I. & P. Railway Co.,* 72 F. (2d) 443, cert. granted sub nom. *Continental Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.,* 55 Sup. Ct. 213; *In re Jacobs,* 7 F. Supp. 749; *Campbell* v. *Alleghany Corp.* (C. C. A. 4th), March 2, 1935. See also Comment (1935), 44 Yale L. J., 651, 655; Hanna, *Agriculture and the Bankruptcy Act* (1934), 19 Minn. L. Rev. 1, 28-9; Hanna, *Frazier-Lemke Amendments to Section 75 of the Bankruptcy Act* (1934), XX A. B. A. J. 687, 689.

In fact every case which has expressly held the Frazier-Lemke Amendment to be on the subject of bankruptcies has been grounded on the extreme breadth of this definition of a bankruptcy law. *See In re Bradford,* 7 F. Supp. 665; *In re Moore,* 8 F. Supp. 393; *Paine* v. *Capitol Freehold Land & Trust Co.,* 8 F. Supp. 500; *In re Cope, In re Chilton,* 8 F. Supp. 778; *cf. In re Miner,* 9 F. Supp. 1, where the question was apparently not considered.

fact embraces *every phase* of the relations between an insolvent or *non-paying* debtor and his creditors.

Both lower Courts here subscribed to that view. The District Court said:

> "Undoubtedly, the Constitution vests in Congress the power to pass laws which are territorially uniform, dealing with the relation of creditor and debtor, when the debtor is unable *or unwilling* to discharge his indebtedness in full"* (R. 54).

The Circuit Court of Appeals stated the tenet as follows:

> "The subject of bankruptcies comprehends *every phase of the relations* between an insolvent *or non-paying* or fraudulent *debtor and his creditors,* extending to his or their relief" (R. 107).

That approach to the constitutionality of the Frazier-Lemke Act compelled the conclusion reached. If it be that concentrated in the Federal Government is the power to control every situation involving *non-paying* debtors, then the commercial life of each State is subject, in large measure, to Federal regulation; for example, Congress could divest State courts of jurisdiction over suits upon promissory notes between citizens of the same state; commercial controversies arising from breach of contract would fall under a like control; crimes such as the obtaining of goods or credits by false pretenses could be defined as crimes against the United States without regard for the powers reserved under the Tenth Amendment to the several States, and, indeed, the lines between State and Federal governments could be largely redrawn.†

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* Italics ours unless otherwise noted.

† For an account of the old Roman and Continental Bankruptcy laws, see Levinthal, *The Early History of Bankruptcy Law* (1918), 66 U. of Pa. L. Rev., 224.

For a general resumé of the bankruptcy laws in England at the time the Constitution was adopted, see 1 Remington on Bankruptcy, 4th Ed., pp. 1-13; Report of the Solicitor General on Bankruptcy Law and Prac-

We challenge the theory that the bankruptcy power of the Federal Government "comprehends every phase of the relations between an insolvent or *non-paying* or fraudulent debtor and his creditors" (R. 107). We submit that this all-embracing doctrine is without constitutional basis and should not, by this Court's sanction, now be written into the Constitution. We do not believe that this Court is ready to encourage a theory of bankruptcy powers, which may later be used for greater and still greater encroachment upon the powers reserved to the States, or to overrule the principles set out in its former decisions, and particularly in *United States* v. *Fox*, 95 U. S. 670.

In that case, this Court held unconstitutional, as an unwarranted invasion of the rights of the States, an Act of Congress making it a Federal offense, under the bankruptcy powers, for a person to obtain credit by false pretenses within three months before bankruptcy, saying (p. 672):

> "* * * And as it is authorized 'to establish uniform laws on the subject of bankruptcies throughout the United States,' it may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system. The object of such a system is to secure a *ratable distribution of the bankrupt's estate among his creditors*, when he is unable to discharge his obligations in full, and at the same time to relieve the honest debtor from legal proceedings for his

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tice, pp. 49, *et seq.*, Sen. Doc. No. 65, 72nd Cong., 1st Sess.; Levinthal, *The Early History of English Bankruptcy* (1919), 67 U. of Pa. L. Rev. 1.

For an account of Colonial insolvency or bankruptcy laws, see 2 Story on the Constitution, 5th Ed., §§ 1106-13; Olmstead *Bankruptcy a Commercial Regulation* (1902), 15 Harv. L. Rev. 829; Kaplan *Is Section 77B a Proper Part of a Bankruptcy Act?* (1935), XXI A. B. A. J. 47.

For developments in the Federal Bankruptcy Laws, see Madison "The Federalist" No. 42; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 195; *Nelson* v. *Carland*, 1 How. 265, 269-274, Catron J.'s dissent; 2 Story on the Constitution, 5th Ed., §§ 1111-13; Olmstead *Bankruptcy a Commercial Regulation* (1902), 15 Harv. L. Rev. 829.

debts, upon a surrender of his property. *The distribution of the property is the principal object to be attained. The discharge of the debtor is merely incidental, and is granted only where his conduct has been free from fraud in the creation of his indebtedness or the disposition of his property.* • • •

But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. *An act not having any such relation is one in respect to which the State can alone legislate.*"

To the effect that *distribution* is the principal object of all bankruptcy laws,* see *Straton* v. *New*, 283 U. S. 318, 320; *Bailey* v. *Glover*, 21 Wall. 342, 346; *Mayer* v. *Hellman*, 91 U. S. 496, 501; *Wiswall* v. *Campbell*, 93 U. S. 347, 350; *Acme Harvester Company* v. *Beekman Lumber Company*, 222 U. S. 300, 307; *Williams* v. *U. S. Fidelity & Guaranty Company*, 236 U. S. 549, 554.

In *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 186, this Court quoted with approval the following language of Mr. Justice Catron, while sitting as a Circuit Judge in *In re*

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* In *In re California Pacific Railroad Co.*, Fed. Cas. No. 2315, the Court said:

"The bankrupt act (14 Stat. 533) even if all provisions for the granting of discharges were stricken out, would still retain *the most important features of a bankruptcy law*, viz.: Those which act upon the debtor *in invitum*. Those provisions are founded on what the author of the bill declared to be *'the first principles of all such systems of laws,' viz.: 'That when insolvency beyond all reasonable chance of recovery occurs, the administration of the bankrupt's effects belongs to his creditors and not to himself.'*"

In Olmstead, *Bankruptcy a Commercial Regulation*, 15 Harv. L. Rev. 829, 843, it is said in speaking of bankruptcy:

"• • • *its main objects are administration or distribution, rather than the relief of the debtor.* Ex-Judge Addison Brown of New York, an able bankruptcy expert, in a decision under the present act says:

'The object of the bankruptcy act is declared to be "to establish a uniform system of bankruptcy throughout the United

Klein, 1 How. 277, 281, where he gave what is probably the most concise and accurate description of the limits of Congressional jurisdiction over "the subject of bankruptcies":

> "• • • Congress has general jurisdiction; and the true inquiry is—To what limits is that jurisdiction *restricted?*
>
> I hold, it extends to all cases where the law causes to be *distributed*, the property of the debtor among his creditors: this is its least limit. Its greatest, is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—*distribution and discharge*—are in the competency and discretion of Congress."

These words clearly referred to the *jurisdiction of Congress* and not to any particular Bankruptcy Act.* That *"distribution"* of the actual assets is an indispensable element in any bankruptcy law, was never, and should not now be, subject to doubt.

In the case at bar, the Circuit Court of Appeals said:

> "The challenged Statute provides for ratable distribution of the bankrupt's assets among his creditors" (R. 106).

We insist that the Act does *not* "distribute" the assets and was not intended to do so.

States." *The most fundamental element in every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt's property among his creditors*, and to do this by means of the agencies created by the act. *That originally was its only purpose.* Later, a second element has been added in the provisions for the bankrupt's discharge, upon such terms and conditions as the act may prescribe. The present act fully provides for both of these objects.'"

For strong emphasis upon the necessity for *distribution*, see also *In re Reiman*, Fed. Cas. No. 11,673 at 495; *Leidigh Carriage Co.* v. *Stengel*, 95 Fed. 637, 647; *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549, 556; *In re Jordan*, Fed. Cas. No. 7,514; *In re Vogler*, Fed. Cas. No. 16,986; 2 Story on the Constitution (5th Ed.), Section 1106; Levinthal, *The Early History of Bankruptcy Law*, 66 U. of Pa. L. Rev., at 225.

* See *In re Landquist*, 70 F. (2d) 929, 932-3, to the contrary.

A.

It Was Never the Purpose of the Frazier-Lemke Act to Distribute the Farmer's Assets, but Only to Scale Down His Debts, While Permitting Him to Retain His Assets.

No distribution was intended. The avowed *legislative purpose* was to "*scale down* existing farm indebtedness", and yet to leave the farmer in possession of the property.

Senate Report on S. 3580, May 28, 1934, frankly stated the legislative* purpose of the Frazier-Lemke Amendment:

> "In short, all that this amendment does is to carry out the purpose of section 75 and *adjust and scale down existing farm indebtedness* to the present value of his property, and it gives the debtor farmer *an opportunity to save his home and maintain his property* by paying for it on the installment plan while the property remains under the control of the court.
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> * * * * * * * *
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> This amendment will make it possible for the Federal Farm Credit Administration, through the Federal land banks, to function *by adjusting and scaling down the indebtedness* to somewhere within the reasonable value of the property."

House Report on H. R. 9566, May 31, 1934 (incorporating as a part thereof a memorandum of Representative Lemke), was equally frank:

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* It is well settled that Reports of Committees of House or Senate may be regarded as an exposition of the legislative intent in determining the purpose and meaning of a statute. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. R. Co.*, 257 U. S. 563. The same is true of explanatory statements made by the committee member in charge of a bill in the course of its passage. *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184; *United States* v. *Coca Cola Company*, 241 U. S. 265; *United States* v. *St. Paul M. & M. Ry. Co.*, 247 U. S. 310, 318.

"Therefore, I respectfully submit that H. R. 9566 is constitutional; that in case the debtor and creditor cannot get together and conciliate under section 75 it provides an honest and efficient method of *scaling down indebtedness* to the present reasonable value of the debtor's property; * * *".

The purpose of the Act was openly declared by Representative Lemke (78 Cong. Rec., p. 12297, June 16, 1934):

"All that this bill does is to put teeth into section 75 of the Bankruptcy Act, which was passed during the closing days of the previous administration. It gives a farmer debtor an opportunity *to scale down his existing indebtedness* to the present value of his property and gives him an opportunity to pay that indebtedness on the installment plan with 1 per cent. interest. * * * *It will scale down farm indebtedness* to their present values so that the Farm Credit Administration can function. * * * It puts a few teeth into section 75 and makes it possible for the farmer *to keep his home* and to provide for his family until he is able to *meet his obligations properly scaled down.*"

The Frazier-Lemke Act is bottomed on principles entirely alien to established bankruptcy law. It is specifically directed against mortgagees and other secured creditors, and was enacted for the very purpose of depriving them of the collateral for which they had bargained and of giving it to the farmer-debtor.* This is clearly shown by the legislative history of the Act (*In re Bradford*, 7 F. Supp. 665, 675).

* The remarks of Representative Truax of Ohio reflect, perhaps, the Congressional temper:

"On June 18, 1934, the Congress of the United States passed H. R. 9865 [*sic* 9566], a new declaration of independence for the American farmer. When this law becomes effective I can but wonder what will become of the ruthless money lender when the breath of gold leaves his feculent body and a financial death stops the rattling of his grasping brain, for he is unfit for the higher realm of life and too foul for the one below. He cannot be buried in the earth, lest he provoke a pestilence; nor in the sea, lest he poison the fish; nor swing in space like Mahomet's coffin, lest the circling worlds in trying to avoid contamination, crash together, wreck the universe, and bring again the noisome reign of chaos and Satan" (78 Cong. Rec., 13062 [June 27, 1934]).

No true bankruptcy measure was ever contemplated; but only a *scaling down* of farmers' debts with an attendant moratorium.

B.

THE FRAZIER-LEMKE ACT SIMPLY SCALED DOWN RADFORD'S DEBT TO THE LAND BANK, WHILE PERMITTING RADFORD TO KEEP ALL HIS ASSETS.

By the appraisal provision [subsection (s) (1)], under which Radford's farm was appraised at $4,445., his indebtedness to the Land Bank was *automatically scaled down to that sum;* upon the payment of which, he became *ipso facto* entitled to (1) an absolutely free and unencumbered title to his farm, and (2) a discharge from the balance of his indebtedness to the Land Bank, which will be compelled to accept this $4,445 in lieu of its $9,000 mortgage with accumulated interest and charges.*

C.

THE FRAZIER-LEMKE ACT DID NOT IN FACT MAKE ANY DISTRIBUTION OF RADFORD'S ASSETS AMONG HIS CREDITORS.

As the result of Radford invoking the Act,

(1) The Land Bank was enjoined for five years, to-wit, until December 1, 1939, from enforcing its lien by

* The claims of the bank were as follows: (1) $7,063.43, together with interest thereon at the rate of 6% per annum from March 1, 1932, less a credit of $9.55; (2) $891.21, together with interest thereon at the rate of 6% per annum from September 1, 1932 (R. 71, 82-83).

It was stipulated that the annual taxes and insurance premiums amount to $105. The debtor who is now in possession has not been ordered to pay this; nor does the statute require that he should do so. It is to be presumed, therefore, that the trustee who holds the property must pay it out of the rent. The net rent is accordingly $220 (R. 80-82). The creditors must also carry the cost of administration.

the sale of the mortgaged property or otherwise; while Radford was expressly allowed to keep all his assets.

(2) Radford was given the opportunity to acquire at any time within five years, full ownership of the mortgaged property free of the lien.

(3) The Land Bank was compelled to give to Radford an option to pay (within five years) the appraised (or reappraised) value and obtain full title to the property free of all lien.

In form, such a proceeding was certainly not a "distribution".

It was not a *"distribution"* in substance or in any sense of the word. In lieu of the property or its proceeds at a fair sale, the Land Bank, as a mortgagee-creditor, was compelled to accept an optional undertaking of Radford to purchase the property within five years at less than half of the mortgage debt. This did not constitute a "distribution" of Radford's assets to his creditors.

If the value of Radford's farm decreased during the five-year period, or, if Radford lost his liking for the farm, he could decline to exercise his option, with the result that the Land Bank would be deprived of its right of distribution measured as of the date of Radford's alleged bankruptcy.

Instead of such a proceeding constituting a "distribution" of *Radford's* property among *his* creditors, a more accurate statement would seem to be that the Frazier-Lemke Act provided for a distribution of the *Land Bank's* property to Radford and his other creditors.

D.

THE CIRCUIT COURT OF APPEALS ERRONEOUSLY RELIED UPON SUPPOSED ANALOGIES TO (1) THE TRANSFER OF A CREDITOR'S LIEN TO THE PROCEEDS OF SALE, AND (2) "COMPOSITIONS" BINDING NON-ASSENTING CREDITORS.

The Circuit Court of Appeals, in sustaining the Frazier-Lemke Act as proper legislation on the "subject of bankruptcies", relied on the supposed analogy to the provisions in earlier acts (1) for a sale of a bankrupt's mortgaged property free of lien with a transfer of the lien to the proceeds of sale, and (2) for "compositions", by which the bankrupt retains possession of his property, upon the payment of an agreed sum, even against the wishes of a minority of non-assenting creditors.

To that argument, we reply:

1. *No analogy to the selling of mortgaged property free of lien.* There is no analogy here to the case of a bankruptcy court selling mortgaged property free of lien and transferring the creditors' lien to the proceeds of sale.

When a Bankruptcy Court believes it to be for the best interests of the general creditors, it may sell mortgaged property free of lien, and transfer the lien from the property to the proceeds of sale. This is constitutional, without the consent of the secured creditor (*Van Huffel* v. *Harkelrode*, 284 U. S. 225), because (1) the power is *discretionary* and may only be exercised by the Court when it thinks the general creditors will have an equity in the proceeds; and (2) the sale is invariably made so as to obtain the highest possible price for the property. No court would authorize a sale at a price *less* than that which the lien creditor himself offered to pay in cash for the property.

Therefore, the lower Court's analogy fails, because (1) the Frazier-Lemke Act gives the Bankruptcy Court no *discretionary* power to sell; (2) the Act does not provide as much money as possible for distribution to general creditors, but simply enables Radford to retain his property through the device of *scaling down* the Land Bank's debt; and (3) the mortgaged property was sold to Radford for *less than half* that which the Land Bank offered to pay for it in cash.

2. *No analogy to "compositions" binding on non-assenting creditors.* In response to the contention that the Frazier-Lemke Act provides for a "distribution" of the bankrupt's property to the same extent as do compositions and corporate reorganizations* authorized by Sections 12, 74 and 77 of the Bankruptcy Act, as amended, we submit:

These sections do not deprive the various "classes" of creditors of their right to demand "distribution". They merely set up machinery by which groups of creditors by class action may, if desired, waive their rights to distribution; and, with the approval of the Court, bind the dissenting minorities. The decisions upholding compositions and reorganizations, constitute no authority for the constitutionality of the Frazier-Lemke Act.

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* The Circuit Court of Appeals summed up its decision that the Frazier-Lemke Act was constitutional by saying (R. 112):

> "Finally, the grounds of complaint are in many respects similar to those upon which the constitutionality of section 77 of the Bankruptcy Act, 11 U. S. C. A. § 205 (providing for corporate reorganizations) has been assailed. While we express no opinion upon the validity of that section, the constitutionality of which will presently be passed upon by the Supreme Court, it is important to note that, so far as its provisions are similar to those here considered, they have not generally been considered incompatible with validity. *In re Chicago, R. I. & P. R. Co.*, 72 F. (2d) 443 (C. C. A. 7). Compare *In re Landquist*, 70 F. (2d) 929 (C. C. A. 7)."

These corporation reorganizations under Sections 74 and 77 of the Bankruptcy Act as amended are merely a form of composition. See *National Surety Company* v. *Coriell*, 289 U. S. 426, fn. at 437.

The reason for coercing the dissenting minority to accept the terms of a composition is given in *In re Lane*, 125 Fed. 772, 773 (approved in *Cumberland Glass Co.* v. *De Witt*, 237 U. S. 447, at 453), where it was stated:

> "The case of composition is in some respects exceptional. It is a proceeding voluntary on both sides, by which the debtor of his own motion offers to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities. The amount offered may be less or more than would be realized through distribution in bankruptcy by the trustee. The creditors may accept this offer or they may refuse it. *For the purposes of the composition all the creditors are treated as a class, and the will of the majority is enforced upon the minority, provided the decision of the majority is approved by the court. Except for this coercion of the minority, the intervention of the court of bankruptcy would hardly be necessary.* • • • Composition is thus treated, even in the act, as in some respects outside of bankruptcy. • • • But if the composition is paid the creditors have no further claim upon the debtor or his property. In a composition the creditor gets, not his share of the bankrupt's estate, but what he bargained for, and he has no right to claim more.
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> The effect of the composition proceeding is to substitute composition for bankruptcy proceedings in a certain sense, and in a measure to supersede the latter proceeding, and to reinvest the bankrupt with all his property free from the claims of his creditors."

In *In re Reiman* (Fed. Case No. 11,673), Mr. Justice Blatchford, then a District Judge, held that the 1874 amendment* of the Act of 1867 (which first authorized "compositions") was constitutional, on the theory that a majority of creditors could waive their right of distribution and bind the minority interests of the same class and that it did, in point of fact, *constitute a distribution* of the debtor's assets among his creditors, and for that reason was a bankruptcy law, saying (p. 495):

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*18 Stat. 182.

> "The principle on which the law of bankruptcy has, in legislation, been founded, is, that when a man becomes insolvent, *the property then remaining to him rightfully belongs to his creditors,* and ought to be distributed ratably among them towards satisfaction of their claims, the debtor himself being released from future liability in respect of his debtors, *upon giving all the aid in his power towards the realization and distribution of his estate for the benefit of his creditors,* and fulfilling the other conditions prescribed by the law for his discharge."

Compositions have never affected a secured claim, held in full by a single creditor, and that is because the "class" theory could not come into play. A composition applies only to property in which a group of creditors claims a share, and is based upon a majority agreement (binding on the minority) to take something else in lieu of their share, and to give the debtor a release of their joint claim. *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, 262-3, 266-7; *Cumberland Glass Co.* v. *De Witt, supra; In re Reiman, supra* (20 Fed. Cas. at pp. 497, 502). In other words, compositions are based upon (1) the general equitable principle of equality and reciprocity among the creditors (*Zavelo* v. *Reeves,* 227 U. S. 625, 628), and (2) the democratic principle that a majority of a class similarly situated, shall control.

For the reasons given above, compositions have genally been regarded as auxiliary to, and, in a sense, merely a voluntary settlement of bankruptcy proceedings already instituted (*Meyers* v. *International Trust Co.,* 273 U. S. 380, 383; *Nassau Works* v. *Brightwood Co.,* 265 U. S. 269, 271-274; *Cumberland Glass Co.* v. *DeWitt,* 237 U. S. 447; *cf. Wilmot* v. *Mudge,* 103 U. S. 217). In fact, legislative recognition that "compositions" are not original bankruptcy proceedings in the strict sense, but merely supplementary thereto, is found in Section 12 (e) of the Bankruptcy Act.

In the case at bar the Circuit Court of Appeals casually passed over the doctrine expressed above on the ground that it was merely a rationalization, saying (R. 106):

> "Of course with respect to consenting creditors it [a composition] is a matter of agreement, *In re Lane*, 125 Fed. 772, 773; *Cumberland Glass Co.* v. *De-Witt*, 237 U. S. 447, 452, yet it is coercion as to non-assenting creditors, however it may be rationalized by considering creditors as a class with the will of the majority enforced upon the minority."

Whether a rationalization or not, "this principle [of majority rule] lies at the foundation of our Government". *In re Klein, supra* (14 Fed. Cas. 724).

Moreover, courts of equity have long had the power to compel dissenting creditors to submit to a plan which the creditors in the majority accept as beneficial.* Although dissenters have not in all cases been bound, this has never been because of lack of inherent power in a court of equity, but, rather, because either the plan violated some principle of fairness, or because the non-assenters had no adequate notice of or part in the reorganization proceedings.†

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* *Railroad Company* v. *Howard*, 7 Wall, 392; *Shaw* v. *Railroad Company*, 100 U. S. 605, 611-12; *Crosthwaite* v. *Moline Plow Co.*, 298 Fed. 466, 469; *St. Louis-San Francisco Railway* v. *McElvain*, 253 Fed. 123; *Simon* v. *New Orleans T. & M. R. Co.*, 242 Fed. 62; *P. R. Walsh Tie & Timber Co.* v. *Missouri Pacific Railway Co.*, 280 Fed. 38; *Temmer* v. *Denver Tramway Co.*, 18 F. (2d) 226; *Jameson* v. *Guaranty Trust Company of New York*, 20 F. (2d) 808; *Fearon* v. *Bankers Trust Company*, 238 Fed. 83; *Kansas City Terminal Railway Company* v. *Central Union Trust Company of New York*, 28 F. (2d) 177, certified questions answered 271 U. S. 445.

† *Kansas City Railway* v. *Guardian Trust Company*, 240 U. S. 166; *Ballentyne* v. *Smith*, 205 U. S. 285; *International Insurance Company* v. *Sherman*, 262 U. S. 346; *National Surety Company* v. *Coriell*, 289 U. S. 426; *First National Bank of Cincinnati* v. *Flershem*, 290 U. S. 504; *Guaranty Trust Company of New York* v. *Missouri Pacific Railway Co.*, 238 Fed. 812; *Graselli Chemical Co.* v. *Aetna Explosives Co.*, 252 Fed. 456;

So far as compelling the minority creditors to accept the will of the majority creditors is concerned, State courts have the same inherent equity powers as Federal courts.*

Independent of the doctrines of equity reorganizations, compositions may be sustained as valid legislation governing the enjoyment of a common property by its joint owners who cannot agree to its use (*Head* v. *Amoskeag Manufacturing Company*, 113 U. S. 9, 21 *et seq.*; see also 4 Kent's Commentaries, 14 ed., 370 *et seq.*; Co. Litt. 200b.) The same rule has been applied by Courts of Admiralty (*The Steam-boat Orleans* v. *Phoebus*, 11 Pet. 175, 183; see *The Ellenora*, 252 Fed. 209, in accord, and the cases therein cited).

In short, the Frazier-Lemke Act can not be sustained as a valid exercise of the Federal bankruptcy powers by analogy to compositions or on any other ground.

Harding v. *American Sumatra Tobacco Co.*, 14 F. (2d) 168; *Parker* v. *New England Oil Corporation*, 8 F. (2d) 392; *Northern Pacific Railway Co.* v. *Boyd*, 228 U. S. 482; *Louisville Trust Co.* v. *Louisville, etc. Railway*, 174 U. S. 674; *Mountain States Power Co.* v. *A. L. Jordan Lumber Co.*, 293 Fed. 502; *Western Union Telegraph Co.* v *United States & Mexican Trust Co.*, 221 Fed. 545.

* *Matter of National Surety Co.*, 239 App. Div. 490, aff'd 264 N. Y. 473; *Clinton Trust Co.* v. *Joralemon St. Corp.*, 237 App. Div. (N. Y.) 789, 790-93; *People* v. *S. W. Straus & Company, Inc.*, 149 Misc. (N. Y.) 38; *Eastern States Public Service Corp.* v. *Atlantic Public Utilities, Inc.*, 17 Del. Ch. 338, 340-1, 156 Atl. 214; *Hauer* v. *Appalachian Gas Corporation*, 19 Del. Ch. 283, 167 Atl. 839.

POINT II.

The Frazier-Lemke Act deprived the Land Bank of its property without due process of law by denying the Land Bank its fundamental right to have the mortgaged property applied to the payment of its debt.

Even if the Frazier-Lemke Act be considered a law "on the subject of Bankruptcies", still the power of Congress to legislate on the "subject of Bankruptcies" is subject to the limitations of the Fifth Amendment.

Each of the great substantive powers of Congress are qualified by, and subject to, the restrictions of the Fifth Amendment, as, for example, the war power,* the power to tax,† the power to exclude aliens,‡ and the power to regulate commerce.§

In *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 192, this Court expressly recognized that the bankruptcy power was subject to the Fifth Amendment, saying:

> "Congress may prescribe any regulations concerning discharge in bankruptcy that are *not so grossly unreasonable as to be incompatible with fundamental law*, * * *"

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* *Ex parte Milligan*, 4 Wall. 2, 119, *et seq.*; *Ochoa* v. *Hernandez*, 230 U. S. 139, 153-4; *Hamilton* v. *Ky. Dist. Co.*, 251 U. S. 146, 155.

† *U. S.* v. *R. R. Co.*, 17 Wall. 322; *Boyd* v. *U. S.*, 116 U. S. 616; *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Blodgett* v. *Holden*, 275 U. S. 142, 147; *Bromley & Co.* v. *Edwards*, 267 U. S. 442, 450; *Heiner* v. *Donnan*, 285 U. S. 312, 326.

‡ *Wong Wing* v. *U. S.*, 163 U. S. 228, 234, 237-8.

§ *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 336; *U. S.* v. *Joint Traffic Assn.*, 171 U. S. 505, 571; *U. S.* v. *Cress*, 243 U. S. 316, 326; *U. S.* v. *Lynah*, 188 U. S. 445, 471; *Adair* v. *U. S.*, 208 U. S. 161, 180; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 410.

A.

The Fundamental Law Vests in a Mortgagee the Right to Have the Mortgaged Property Devoted Exclusively to the Satisfaction of the Mortgage Debt.

It has always been the fundamental law in this country that a mortgagee had the right to receive the full proceeds (up to the amount of his debt) of a sale of the mortgaged property. At the sale the mortgagee could protect himself by bidding in the property. In other words, the very essence of a mortgage was the right of the mortgagee to have the property devoted to the satisfaction of his debt.*

Until the passage of the Frazier-Lemke Act, no court or legislative body had ever provided that the debtor might keep the property for himself, while forcing the mortgagee to accept an amount less than his debt—an amount not determined by a sale of the property at which the general public, including the mortgagee, had the opportunity to bid.

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* See Wehle, *Railroad Reorganization Under Section 77 of the Bankruptcy Act: New Legislation Suggested* (1934), 44 Yale L. J., 197, 212:

"Under Anglo-American law, since long prior to 1787, the mortgagee on foreclosure sale has had the optional right either to accept the proceeds of a fair competitive sale (if not more than the amount of his claim), or, if the highest bid at such a sale be insufficient to pay the debt, to bid in the property for himself and have the amount of his bid credited on the mortgage debt; in other words (aside from the right to a deficiency judgment), the mortgagee has traditionally had an optional right either to the proceeds of a fair competitive public sale, or to the property itself. As to the right of the mortgagor to have the property for the amount of the debt, this is so generally familiar as to require no exposition here."

And again at page 229:

"* * * The foregoing records of legal authority, sufficiently indicate that the settled maxims of three hundred years of Anglo-American bankruptcy laws safeguard the creditor who is secured by a mortgage from the debtor, by rigidly insuring to him exclusive right, not only as against the mortgagor, but also as against other creditors, to the full value of the mortgaged property, with the further right to prove with other creditors for any deficiency."

For hundreds of years the laws of England and America have guaranteed to a mortgage creditor the exclusive right to have the full value of the mortgaged property applied towards the payment of his debt. Provisions for the discharge of the debtor from the balance of his personal obligation never before sought to interfere with that right.

Upon that fundamental principle was built up the whole system of credit, by which debtors were enabled to borrow money by mortgaging property to the lender. There would have been a very different credit history in this country and in England if it had ever been the law that a debtor could borrow money, pledge property to secure the payment thereof, and yet, upon default, retain the property for himself and prevent the lender from having the thing pledged devoted to the payment of the debt. When, in *Hanover National Bank* v. *Moyses, supra,* this Court said that the power of Congress to discharge a debtor in bankruptcy was subject to the limitation that its exercise should not be "so grossly unreasonable as to be incompatible with fundamental law", the "fundamental law" which this Court must have had in mind, was, at least, that a debtor should not be discharged from his debt and yet allowed to keep the mortgaged property against the creditor's consent. This is so because the "fundamental law" on the subject has always been, until the passage of the Frazier-Lemke Act, that the creditor was entitled to have the thing pledged devoted to the payment of his debt and that the right of the debtor to retain title to the property pledged, was subject to the paramount right of the creditor to have the property sold and the proceeds applied towards the payment of the creditor's claim.

While, of course, Congress under the power to pass laws on the subject of bankruptcies, can impair the obligation of contracts—for such is the very essence of bankruptcy law—

yet it cannot destroy vested rights of property, contrary to the law of the land.

In *Gunn* v. *Barry*, 15 Wall. 610, Georgia increased the amount of property exempt from execution levy. This Court held that the Georgia laws were void as against pre-existing indebtedness not only because they impaired the obligation of contracts but for an even more fundamental reason, saying (p. 622):

> "But the Act reaches still further. It withdraws the land from the lien of the judgment, and thus *destroys a vested right of property* which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. *It is in effect taking one person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact.*"

Congress, then, as now, was sympathetic with the idea of relieving debtors from their pre-existing debts; and because this Court had held in *Gunn* v. *Barry*, that the State could not do so, Congress endeavored to accomplish the same result under its bankruptcy power. It adopted an amendment of March 3, 1873, to the Bankruptcy Act, which, in part, provided for additional exemptions:

> "• • • to an amount allowed by the constitution and laws of each State, as existing in the year eighteen hundred and seventy-one [i. e., irrespective of whether or not those state constitutions and laws were valid]; and such exemptions shall be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding." (Act, March 3, 1873, c. 235; 17 Stat. p. 577).

In *Gunn* v. *Barry*, this Court had apparently anticipated just such action by Congress, with the following warning (15 Wall. at p. 623):

> "Congress cannot, by authorization or ratification, give the slightest effect to a State law or constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States, and is alike obligatory upon both."

The foregoing Bankruptcy Amendment of 1873 was attacked in *In re Dillard*, 2 Hughes, 190, Fed. Cas. No. 3912. In that case the Court pointed out that it would be violative of the Fifth Amendment for Congress to say that a debtor should have an exemption which the State could not give him, and which was not a real distribution of the debtor's estate among his creditors, but merely an opportunity for the debtor to keep a certain amount of his property out of his creditors' reach. The Court (striving to save the constitutionality of the amendment) disregarded its expressly retroactive language and gave it a purely prospective meaning, saying (p. 706):

> "It is contended at bar that the act of March 3, 1873, is not an act which gives wider scope or more force to the state exemption laws, which heretofore have been the only authority for homestead exemption in the bankruptcy courts, but that it, itself, provides a statutory exemption paramount to all liens of judgments and decrees of whatever date, and is only limited in amount by the provision of the state statute. *If the act of March 3, 1873, intends to give the state exemption laws quo state laws a force and power which the state could not give them, then it is void* * * *.
>
> We must not, if we can avoid it, give to the act of congress such a construction as would be contrary to reason and justice. We must not suppose they intended to violate the fundamental principles of the social compact. *Yet, to say congress has provided, by the act of March 3, 1873, that every bankrupt shall have his property restored to him, freed from the liens vested in his creditors*

prior to the passage of that act, is to hold that they have done as the legislature of Georgia had done, i.e., enacted a law contrary to reason and justice, and, in the view of the Supreme Court, subversive of the fundamental principles of the social compact. Gunn v. Barry (supra). Such a view cannot be entertained. There is but one other construction to be given to the statute, and that is, that like all statutes it is prospective."

The oft-quoted language in *Loan Ass'n v. Topeka*, 20 Wall. 655, 662, 664, provides an answer to the popular cry that Congress should be able to adopt legislation in order to relieve debtors from their improvident obligations at the expense of their creditors, and yet permit the debtors to retain the property which they had pledged as security for the money borrowed:

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute * * * *which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.* * * *

This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

In *Ochoa* v. *Hernandez*, 230 U. S. 139, 161, it was said:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. *Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.*"

B.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE FOREGOING RIGHT OF THE LAND BANK WAS NOT INVADED.

In holding that the Land Bank was not deprived of its property without due process of law by being compelled to give Radford a five-year option to pay the appraised value of $4,445 (or a value fixed by reappraisal at that future date selected by Radford), for the property free and clear of the Lank Bank's lien of $9,200, the Circuit Court of Appeals reasoned that whatever loss the Land Bank would sustain was through Radford's insolvency and that it could sustain no additional loss through the operation of the Frazier-Lemke Act requiring the sale to Radford at the appraised "fair value", because,

> (1) The $4,445 appraised "fair value" must be and was at least the full market value, and the Land Bank's bid of $9,205.09 for the property "had no possible bearing upon the *fair value*".
>
> (2) The provision of the Act requiring a reappraisal at the time Radford exercised his purchase option gives the Land Bank the benefit of any possible enhanced value of the property.

To these conclusions we respond:

1. That in addition to any loss already sustained through Radford's insolvency, the Land Bank will sustain further loss through a sale to Radford at the $4,445 appraised "fair value", because

(a) That value is not equivalent to the present market value; and

(b) The Land Bank will be deprived of any possible enhanced value.

(a) Even the Circuit Court of Appeals admitted that if the appraised "fair value" was *lower* than the market value, it would not stand the test of judicial review.

We submit that the "fair value" of $4,445 *was lower* than the "market" value.

Before the enactment of the Frazier-Lemke Act the Land Bank offered to accept a deed to the property in satisfaction of its indebtedness (then approximately $9,000.) and, after the passage of the Act, offered in open court to pay $9,205.09 for the property. The Circuit Court of Appeals insisted that these bids had no possible bearing upon the value of the property. But these bids did have a decided bearing on the market value of the property. They may not have conclusively established the market value of the property at $9,205.09; but they certainly showed that the market value exceeded $4,445. The property must have been worth more than $4,445, otherwise the Land Bank would have been willing to accept that sum and would not have preferred to take the property in full payment of its $9,205.09 claim against Radford.

We submit that the Circuit Court of Appeals erred in holding that the $4,445 appraised "fair value" was necessarily the market value or higher, for the simple reason that the Land Bank offered to pay more than $4,445 for

it. After all, the test of market value is what somebody is willing to pay for the property (Cf. *Adams Express Co.* v. *Ohio*, 166 U. S. 185, 220, 222).

(b) Radford could purchase the property for $4,445 and deprive the Land Bank of any possible benefit from an increased value of the mortgaged property. But for the Frazier-Lemke Act, the property would have been sold at a fair competitive public sale at which the Land Bank could protect itself by bidding in the property and holding it for an enhanced value.

In depriving the Land Bank of its right to receive a sum equal to the market value of the mortgaged property and of its right to bid in the property itself and benefit from increased values, the Frazier-Lemke Act deprives the Land Bank of its property without due process of law.

2. The reappraisal provision of the Frazier-Lemke Act does not safeguard to the Land Bank the right to benefit from any enhanced value of the mortgaged property.

The Land Bank cannot require reappraisal at the time when, in its judgment, the opportune time to sell to Radford will have come—that is, when the farm will have reached its peak value at some time within the five-year period. Radford alone can determine the time at which that reappraisal is to be made. It is made only when Radford exercises his purchase option. This he can do at *any time* during the five-year stay period. It is entirely possible that through a continuance of the present Federal subsidies to farmers, and inflation, the mortgaged property will acquire a high temporary artificial rating which may collapse before Radford exercises his purchase option. If so, the Bank can derive no benefit through the increased value.

As the option is in Radford, he will certainly not elect to purchase the property at a high value if he believes that he can wait until the end of the five-year stay period and buy the property for less.

It is clear, therefore, that the reappraisal provision does not necessarily enable the Land Bank to benefit from an enhanced value of the mortgaged property.

To summarize:

The reasons given by the Circuit Court of Appeals in support of the Act do not meet the real issue presented. The Court undertakes to demonstrate that the Land Bank and others similarly situated will not suffer further financial loss by the operation of the Frazier-Lemke Act; and that, therefore, the Act should be upheld.

We dispute the accuracy of the Court's financial forecast; and we insist, in addition, that it is beside the point.

The question is whether or not the Act is repugnant to the deep-rooted principles of American law relating to the rights of a mortgagee. Heretofore a mortgagee has had a vested right to have the mortgaged property devoted exclusively to the satisfaction of the mortgage debt, either by receipt of the proceeds of a fair competitive public sale or by application of the property itself. No one has yet had the hardihood to argue that the Frazier-Lemke Act actually preserves this right. The argument is that the Act provides a substitute; that the arrangement giving the mortgagee an appraised value is the equivalent of his traditional right; and that on an *injuria absque damno* theory the Act should be sustained. This, we submit, is a denial of due process in that it constitutes a taking of the Land Bank's property for the benefit, and private use, of Radford, contrary to the settled usages and maxims of the fundamental law of the land.

POINT III.

The Frazier-Lemke Act contains provisions so unreasonable, capricious and arbitrary that the Land Bank is deprived of its property without due process of law.

This unreasonable and arbitrary character appears in every division of the subject matter to which the Act is addressed.

1. In the Creditors Chosen for Attack.*

(a) Discrimination between creditors before and after June 28, 1934.

The only creditors who are restrained by the Frazier-Lemke Act are those whose claims existed on June 28, 1934. The Act expressly excludes from its effect all debts, secured or unsecured, created *after* June 28, 1934; such creditors retain their rights against the debtor intact and may enforce them to the fullest extent—while, as just shown, all debts before June 28, 1934, no matter how close to that

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* The Land Bank is a Federal Agency; and all notes and mortgages taken by it (such as Radford's) and the bonds secured thereby, are "instrumentalities of the Government of the United States" and as such exempt from all taxation; and the bonds are expressly declared to be "a lawful investment for all fiduciary and trust funds" (39 Stat. 380). In accordance with that authority Radford's farm in 1922-24 was appraised at $18,000; his notes and mortgages to the Land Bank are "instrumentalities of the Government of the United States;" and the Land Bank bonds secured by the Radford notes and mortgages are a "lawful investment for all fiduciary and trust funds" (*Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Federal Land Bank of New Orleans* v. *Crosland*, 261 U. S. 374).

In the face of those provisions, Radford now contends that under the Frazier-Lemke Act, the Land Bank and the holders of its bonds although

dividing line, are suspended in midair. In the application of a national bankruptcy law to a *non-paying* debtor, this discrimination between creditors whose claims existed *before* and those whose claims arose *after* June 28, 1934, is a purely arbitrary discrimination, with no just basis to support it.

(*b*) Discrimination between creditors secured by exempt property and those secured by non-exempt property.

The creditor holding a lien on exempt property *is favored over the creditor holding a lien on non-exempt property.* After a farmer's exempt property has been appraised and set aside to him, subsection (s) is no longer applicable to that property [*Zapalac* v. *White*, 9 F. Supp. 419 (S. D. Tex., 1934); *In re McMurray*, 8 F. Supp. 449 (S. D. Iowa, 1934)]. Exempt property is, however, subject to mortgages on it under the laws of many States, and the creditor may pursue his State remedy against the exemptions once they have been set aside to the debtor, for the jurisdiction of the Bankruptcy Court over exemptions then ceases (*Lockwood* v. *Exchange Bank*, 190 U. S. 294; *In re Osterritter*, 3 F. Supp. 674; see also Hook, *Does the Frazier-Lemke Amendment Grant Relief as to Debts Secured by Liens on Exempt Property?* (1934), 11 A. B. Rev., 21.) The creditor with a lien on exempt property might possibly realize more than *the appraised value* of

"instrumentalities of the Government of the United States" must nevertheless surrender the security and accept an appraised value, and the beneficiaries of the "fiduciary and trust fund" investments must stand the loss, while Radford retains his property unimpaired.

If, at the time, when the Land Bank took the Radford notes and mortgages and issued bonds with them as the security therefor, it had been suggested that it was within the power of Congress to authorize under the Bankruptcy power a proceeding which would take away the real estate security for the bonds and substitute therefor the value fixed by some local appraisers, it is inconceivable that investors would ever have purchased the securities.

the property so set aside, and the Bankruptcy Court would have no jurisdiction to compel him to pay the excess over the appraised value to the general creditors.

2. In Its Extinction Not Only of the Lien, But of the Contract.

(*a*) No provision is made for a deficiency claim by the mortgagee against the bankrupt's estate. The legislative intent was to abolish deficiency judgments by "scaling down" the mortgage indebtedness. (Senate Report on S. 3580, May 28, 1934; House Report on H. R. 9566, May 31, 1934; Remarks of Representative Lemke (78 Cong. Rec., p. 12297, June 16, 1934.) *In re Bradford*, 7 F. Supp. 665, 675, held that no deficiency claim should be allowed.* The press statement of President Roosevelt in approving the bill expressly stated:

> "It will prevent *deficiency judgments*—a form of liability which, in the judgment of many thinking business men ought to be abolished" (New York Times, June 30, 1934).

"Thinking business men" to the contrary notwithstanding, this is a wholly arbitrary destruction of a contract right.

(*b*) Interest on the mortgage debt is wiped out save (1) in so far as a negligible amount may be realized from the rental (here only $325), after payment of taxes and insurance (here $105), upkeep of the property, and costs of bankruptcy administration; and, perhaps, (2) a very nebulous possible right to participate with general creditors in such amount

* Judge Dawson (R. 58) said that the mortgagee had a deficiency claim.

as is realized from unpledged property (but only if the statute is construed, contrary to the intent of its authors, to permit a deficiency claim over against the bankrupt estate).

(c) The fixing of the value of the debtor's property by appraisal at its "then fair and reasonable value, not necessarily the market value," is arbitrary, capricious and unreasonable. No guide, rule or standard is offered by which this "fair and reasonable value" is to be reached. Here the Bank offered to pay $9,205.09 in cash for the mortgaged property, but its value was fixed at $4,445. If the Bank's offer had been accepted, its claim would have been satisfied, and the value of all of Radford's unpledged property would have been applied on his other debts. But if Radford elects to purchase the mortgaged property at $4,445, the Bank will either (1) have, perhaps, a deficiency claim for $4,760, and be entitled to a pro rata share of his unpledged assets thereby greatly reducing the amount which can be paid to general creditors, or (2) on the other and more probable construction have $4,760 of its debt confiscated for Radford's benefit and for the benefit of his general creditors.

(d) All risk of a decline in value is placed on the creditor, with the option in the debtor to abandon the proceedings if at any time he deems it expedient to do so.

(e) The arbitrary operation of this Act is illustrated by the possibility in many cases of a mortgagee or secured creditor being worse off than the unsecured creditor. The debtor, for instance, may owe the mortgagee $10,000 secured by a first mortgage on a farm. The reasonable value of the mortgaged property by appraisal or reappraisal is determined to be $6,000. The debtor owes general creditors $10,000. His unpledged property, real and personal, is worth $8,000. Gen-

eral creditors would get 80% of the face value of their claims, and the secured creditor would get only 60% of the face value of his claim. If all of the debtor's property were thrown into *hotchpot* and divided pro rata among the secured and general creditors, each creditor would receive 70% of his claim. *The mortgagee is penalized 10% for having taken security.*

3. In the Method of Procedure.

(*a*) As to the relative rights of secured and unsecured creditors in electing between [(s) (3)] and [(s) (7)].

(1). Secured creditors are prohibited from enforcing their mortgages, and are compelled to accept either a six-year sale on the instalment plan [(s) (3)], or a five-year stay of all proceedings [(s) (7)].

(2) *Unsecured* creditors have no voice in determining whether the six-year sale plan shall be adopted in preference to the five-year stay plan. The choice lies with the *secured* creditors alone. To have the *unsecured* creditors' fate depend solely upon the decision of *secured* creditors, whose interests are not identical, and, in most cases, adverse, is capricious legislation. (*Eubank* v. *Richmond*, 226 U. S. 137.)

(*b*) As to the reappraisal provisions.

(1) Only *encumbered real estate* is subject to the reappraisal provisions, and then only upon the request of the lienholder.

(2) *There is no provision for reappraisal of unencumbered realty.* General creditors (including the Land Bank if the Act be construed to give it any claim for a deficiency) cannot have the full value of the farmer's

property applied to the payment of their claims at the time their debts are extinguished. Instead, where the debtor elects to retain all rather than a part of his property as the Act expressly permits, they must be satisfied with the value placed on unencumbered property by appraisal made *five years earlier*, even though (*a*) the value of the property shall have become greatly enhanced, and (*b*) at the time the appraisal was made, they might have been willing to bid much more than the appraised value of the property.

According to the appraisers' report, Radford owned some unencumbered realty (R. 87). Suppose oil should be discovered on Radford's unencumbered land within five years? If so, he alone would receive the increased value, while his creditors would only receive the amount of the original appraisement.

(3) *There is no provision for a reappraisal of personal property pledged or unpledged.** Therefore, a creditor secured by personalty, is bound by the *original* appraisal, even though the collateral appreciably increases in value during the period in which the debtor retains possession of it. Such a secured creditor is denied the right to have the full value of his security applied to the payment of his claim at the time the debt is extinguished. Instead,

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* As Representative Hancock of New York put it (78 Cong. Rec., p. 12294, June 16, 1934):

"This bill does not apply to mortgages on real estate only but it applies to liens on all kinds of property and pledges as well. For example, a farmer may buy an automobile on a conditional contract, or a radio, or he may have a chattel mortgage on his cows and pigs and on his furniture. He may have pledged stocks and bonds at the village bank to secure a loan, and he may have a mortgage on his real estate. If he goes into bankruptcy, every one of those liens is reduced to the reappraised value of the articles they cover, to the then value of the property covered by the lien, and it can never be restored to the original amount, no matter how much values increase."

he must look to, and share with unsecured creditors in, any other assets of the farmer, for the balance of a claim, which might be paid in full by the liquidation of the specific collateral pledged on his loan.

Unsecured creditors likewise must accept their share of the original appraised value of the unencumbered property, real and personal, regardless of subsequent appreciation.

(4) Thus, at any time within five years, Radford has the option to buy back (a) not only his unencumbed *real* estate, but also (b) his *personal* estate, whether encumbered or not,—all at the value placed upon them by the *original* appraisal, whereas their actual value, at the time he exercises his option (when the depression may have passed away, or inflation may have trebled values or new uses have been discovered), may be far greater than the original appraised value which he is permitted to pay. This may give to the debtor a handsome fortune, free from the claims of his creditors. He pays nothing for the gamble.

4. In Its Rigid Fixation of Terms by Legislative Fiat.

(*a*) Duration of stay.

(1) ***All proceedings are stayed*** for the fixed ***arbitrary period of five years without regard to whether any emergency exists for so long a time.*** The creditor cannot, for five years, take any step, either in a State or Federal court, to enforce his mortgage lien, or to collect the rents and profits, even though they are specifically mortgaged to him (*as in this case*, R. 18, 27), or otherwise to obtain any equitable relief whatsoever.

(2) Since the proceeding can be instituted at any time before March 3, 1938, the *period of the stay may extend to* March 3, 1943, or *more than nine years* from the date of the passage of the Act and the incurring of any indebtedness to which the Act applies—all this entirely without regard to the future situation of the debtor or the general economic condition of the country.

(3) The Court has no discretion concerning the minimum duration of the stay, the debtor's possession of the property, or the terms upon which he may repurchase—all this being fixed by legislative, not judicial, decree.

(*b*) Terms of purchase.

(1) At any time within the five-year period, the farmer debtor has the *option* (1) to pay the *appraised* or the reappraised *value* of the property, thereby *discharge the mortgage debt* and take the property or (2) throw the property back on the hands of the mortgagees or the Court. Not until the full period has elapsed can the creditor have any notion of his rights.

(2) The mortgagee is compelled to permit the farmer to buy back the property at an appraised value (not necessarily the market value), and be released from his indebtedness, even though the mortgagee or the general public would bid much more than the appraised or reappraised value for the property. The mortgagee is thereby deprived of the opportunity (1) to receive from the general public what the property would sell for, or (2) to bid the amount of the debt for the property, so as to obtain at least that property which was specifically pledged to secure the loan which he made to the farmer.

(c) Terms of Possession in Interim.

(1) The debtor *remains in possession* for five years, thereby ousting the creditor of all of the rights* given under the mortgage, and under the laws of the State where the property is located.

(2) All that the debtor has to pay for the enjoyment of these privileges—which are purely at his option—is "a reasonable rental annually for that part of the property of which he retains possession," which rental is then to be distributed between the secured and unsecured creditors, as their interests may appear.

(3) *The first payment of rent does not have to be made for six months.* The debtor's possession for the first six months is without compensation or security. During that period he may harvest and sell his crops, consume or make away with the proceeds and abandon his Frazier-Lemke proceeding, leaving his mortgage

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* See Judge Chestnut's opinion in *In Re Bradford*, 7 F. Supp. 665, 675, where it is pointed out that paragraph 7 of the Frazier-Lemke Act "makes very substantial changes in the rights of the mortgagee.

The most important are: (1) His right to realize on the security, in event of default, is suspended for five years. This period is fixed and absolute, without relation to the continuance of or change in existing conditions, and without judicial determination of adequate cause, or power of change to adjust to altered conditions; (2) at the end of the period the title to the security is transferred to the mortgagor upon payment of a sum determined by appraisers (subject to a somewhat uncertain judicial review) and which may be for an amount substantially less than the mortgage debt; (3) no provision is made for a deficiency claim by the mortgagee against the bankrupt's estate; (4) during the five year period a reasonable rental is to be paid, but the first payment is to be deferred for six months without security therefor, other than sale upon default. The effect of this may be at least a six months moratorium without *any* compensation therefor to the mortgagee, during which time the mortgagor retains the use and enjoyment of the property."

creditor to take the land *minus* the crops mortgaged to him (they are so mortgaged in the case at bar).

(4) *No provision is made for the payment of taxes, insurance or repairs, in contrast to the express requirement of paragraph (3) of the Frazier-Lemke Act.* If the Trustee in Bankruptcy should apply the rental to those purposes, there is no assurance that the mortgagee would receive a dollar during the five years. In this case, on a $9,200 indebtedness, the Bank will only receive such share as may be distributed to it out of what is left of $220, after payment of the cost of administration and upkeep of the mortgaged property.

A.

CERTAIN OF THESE ARBITRARY FEATURES MAY BE FURTHER CONSIDERED:

1. *The discrimination between debts contracted prior to June 28, 1934, and debts contracted thereafter is a violation of the due process clause of the Fifth Amendment.*

The discrimination attempted by the Frazier-Lemke Act between creditors prior to June 28, 1934, and creditors after June 28, 1934, has no justifiable basis. Only one suggestion* has been put forward in support of it, namely, that if obligations incurred after June 28, 1934, were not exempted then the farmer might not be able to obtain new credit. This, in itself, exposes the unreasonableness of the exemption. A

* This proviso was added to the Frazier-Lemke Act at the last minute upon the insistence of Senator Bankhead, 78 Cong. Rec. 12,253, 12,254, 12,256, June 16, 1934; *ibid.* 12,471, June 18, 1934.

first mortgage given on June 27, 1934 is scaled down. A second mortgage given on June 29, 1934 on the same property escapes the Act. No possible basis for distinction between the two exists. After the debtor pays to the first mortgagee the appraised price, the second mortgagee has not only an unimpaired mortgage in full force and effect but also one which becomes the senior lien upon the land. *The incongruous result is that a debt junior in point of time and junior in point of lien would prevail over a debt senior in point of time and senior in point of lien.*

Further, the proviso excluding from the application of the Frazier-Lemke Act all debts incurred after June 28, 1934, produces discriminations so complex that the Act is not only void but wholly unworkable. There will be presented the anomalous situation where the debtor will be going through bankruptcy under the Frazier-Lemke Act so far as one set of creditors is concerned, and, perhaps not in bankruptcy at all so far as the other set of creditors is concerned. A consideration of the probable rights of the two sets of creditors in those circumstances is too involved to warrant more than mention.

If, however, the debtor be in bankruptcy for both sets of creditors, then would arise complicated questions of marshalling the bankrupt's assets and the administration of his estate with due regard for the rights of creditors with claims arising after June 28, 1934. The Act makes no distinction between property acquired by the bankrupt before or after June 28, 1934. Both sets of general creditors would ordinarily have recourse against all of the free assets of the bankrupt to satisfy their respective claims. But, creditors whose claims arose before June 28, 1934, must leave all the assets in the hands of the debtor until he chooses within five years to pay

their appraised value; while creditors whose claims arose after June 28, 1934, presumably have the right, expressly reserved by statute, to have all of the same assets converted into cash and the proceeds distributed forthwith. How these questions will be resolved in each case is wholly unpredictable. Suffice it to say that the Act itself, being contradictory in terms, affords no solution.

That an arbitrary classification, resulting in an unreasonable discrimination, is a violation of the due process clause of the Fifth Amendment was recently and unequivocally established by this Court in *Heiner* v. *Donnan*, 285 U. S. 312, where a provision of the Revenue Act of 1926 declaring that all gifts made within two years before death were conclusively presumed to have been made in contemplation of death, was held a violation of the due process clause of the Fifth Amendment.*

There was no question but that Congress had the power to tax gifts *inter vivos* as well as testamentary gifts. The only question involved was whether the distinction between gifts made two years and one day before death and those made within two years before the death of the donor was

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* There can be no doubt that the denial of equal protection of the laws constitutes lack of due process.

In *Truax* v. *Corrigan*, 257 U. S. 312, 332, this Court, in holding unconstitutional the Arizona Anti-Injunction Law on the ground that it was a denial of equal protection, indicated that the Act could also have been held void under the due process clause, which *Heiner* v. *Donnan*, *supra*, shows to be the same in both amendments. Mr. Chief Justice Taft said:

> "Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws."

arbitrary and unreasonable. Mr. Justice Sutherland said (p. 331):

> "In the *Schlesinger* case, the Supreme Court of Wisconsin had expressly held that the tax could not be supported as one on gifts *inter vivos* only, saying, 'Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event. It is because only one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid.' *Estate of Schlesinger*, 184 Wis. 1, 10; 199 N. W. 951. This court accepted that view in these words (p. 239): 'The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be "wholly arbitrary." We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment.' And it follows that the present provision, written in almost identical terms, is in plain conflict with the Fifth Amendment."

See also *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U. S. 32.

If the attempted exercise by Congress of its plenary power to tax is unconstitutional because of the arbitrary classification between gifts made within two years and gifts made more than two years before the death of the donor, certainly the classification in the Frazier-Lemke Act between debts contracted prior to June 28, 1934, and debts contracted after that date is a violation of the due process clause of the Fifth Amendment.

A case very closely in point is *Bronson* v. *Kinzie*, 1 How. 311, where this Court ruled that the Illinois statute of February 27, 1841, regulating execution sales violated the "contract" clause of the Constitution. Recognizing the con-

trolling principle of equality which the Fourteenth Amendment later expressed, Mr. Chief Justice Taney said (p. 320):

> "And this law is still more objectionable, because it is not a general one, and prescribing the mode of selling mortgaged premises in all cases, but is confined to judgments rendered, and contracts made, prior to the 1st of May, 1841. The act was passed on the 27th of February in that year; and it operates mainly on past contracts, and not on future. If the contracts intended to be affected by it had been specifically enumerated in the law, and these conditions applied to them, while other contracts of the same description were to be enforced in the ordinary course of legal proceedings, no one would doubt that such a law was unconstitutional. Here a particular class of contracts is selected, and encumbered with these new conditions; and *it can make no difference, in principle, whether they are described by the names of the parties, or by the time at which they were made*".

2. *The Frazier-Lemke Act is a Legislative invasion of the Judicial power contrary to Article III, Section 1 of the Constitution.*

As we have seen (pp. 3, 7, 40-43, *supra*), the Act makes it compulsory that a Court issue a peremptory mandate staying all proceedings for a fixed period of five years. This, the Court must do, and having done it, must maintain it without regard to the circumstances of either debtor or creditor. The very essence of judicial power is to render judgment as the facts of each particular case require. With this fundamental power of the Judiciary, Congress may not interfere. It can, of course, within limits, define the rights of the parties who invoke a statute, but it cannot, by legislative fiat, create rights in individuals which will deprive the Courts of their inherent functions.

The Frazier-Lemke Act allows the Bankruptcy Court little or no discretion. The length of the stay must be five years if the debtor so desires and the debtor must be discharged upon the payment at his option of the appraised value of the property. The administration of the debtor's estate is dictated by statute. The Court has no authority to compel the debtor to pay off his creditors even at prices set by appraisals or reappraisals. Stripped of the power to bring the proceedings to an end, the Court must stand by, leaving all, by legislative decree, to the whim of the debtor. So it is, that the Court is divested of authority to prevent a debtor from abandoning the arrangement (forced upon his creditors by paragraph 7) even where good conscience demands and circumstances permit its consummation.

The only discretion left to the Court is to confirm the value fixed by the appraisers and to approve a "reasonable" rental for the land of which the debtor retains possession. Evidently the Court must confirm the appraised value unless collusion or fraud on the part of the appraisers is shown. Certainly both Courts below felt that it was not within what was left of their discretion to upset the value fixed by the appraisers on the ground that it was less than half the Land Bank's cash offer. Nor does it seem that the Court is given any extensive discretion in fixing the rental which the debtor must pay during the five-year interim. The rental, by the natural construction of the terms of the statute, must be based upon the appraised value of the land which the farmer retains and must not take into consideration any other assets which the farmer happens to own. By the terms of the Act, there is not, and can not be a judicial investigation and determination of the merits of each proceeding.

In *Ogden* v. *Saunders*, 12 Wheat. 213, 365, Mr. Justice Johnson said:

> "Every bankrupt or insolvent system in the world, must partake of the character of a judicial investigation. Parties whose rights are to be affected, are entitled to a hearing."

The Frazier-Lemke Act goes beyond the mere denial of a creditor's right to a hearing. It renders a hearing absolutely futile because the Court, as seen above, is without power to decide on the merits the cardinal questions at issue. This, it is submitted, is not only a denial of due process of law, but represents an attempted exercise by the Congress of judicial powers which, by Article III, Section 1 of the Constitution, are confided exclusively to the Judiciary.

It is well settled that the Legislative branch of the Government cannot, by its own fiat, usurp the functions of the Judiciary.

In *Kilbourn* v. *Thompson*, 103 U. S. 168, this Court said (p. 192):

> "The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legis-

lative department of the government. We think it equally clear that the power asserted is judicial and not legislative."

The inflexible denial to the creditor of any remedy in a Federal or State court for a period of five years is an invalid exercise by the Legislature of a judicial function, and is, we submit, unconstitutional as in violation of Article III of the Federal Constitution.

The case of *Burt* v. *Williams*, 24 Ark. 91, is apposite. There the Supreme Court of Arkansas in 1863 held void a statute which provided for a stay of suits "until after the ratification of peace between the United States and the Confederate States." After discussing other grounds of constitutional objection, the Court said (p. 94):

> "No fact is to be ascertained by the courts, no application of legal principle is to be made to the fact that the legislature has ascertained, but the courts, as registers of the legislative will, are to record its edict, closing indefinitely the temple of justice to all its suitors.
>
> This is not the manner in which courts exercise judicial functions, is not a proper subject, or legitimate use of legislative authority, inasmuch as the powers of the government of this state are divided by the constitution into distinct departments, each of which is confided to a separate magistracy: the legislative powers to the general assembly, the judicial powers to the judiciary. *Constitution, art. iii.*"

See also to the same effect:

Riglander v. *Star Co.*, 98 App. Div. 101, 103, 105, aff'd 181 N. Y. 531;

Bell v. *Niewahner*, 54 App. Div. (N. Y.) 530;

Barnes v. *Barnes*, 53 N. C. 366, 374.

POINT IV.

The Frazier-Lemke Act cannot be sustained on any doctrine related to an emergency.

Undoubtedly it will be urged that the Frazier-Lemke Act can be sustained on the authority of *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, wherein this Court decided, in substance, that, under the reserved power of the States, Minnesota could, during the continuance of a declared emergency, and in no event longer than about two years, postpone the enforcement of mortgage liens and permit the debtor to remain in possession of his property, upon the payment of the reasonable rental value thereof.

The Minnesota Act, however, was of a very different color. As summarized in the opinion of this Court (pp. 425, 447), the Minnesota statute did not (a) impair the integrity of the mortgage indebtedness; (b) the obligation for interest remained; (c) the right of a mortgagee-purchaser to title in fee was not affected; (d) the right to a deficiency judgment failing redemption remained; (e) the rental was devoted to the required payments of taxes, insurance and interest on the mortgaged indebtedness; and (f) the relief afforded was not only temporary and conditional, but might be adapted by the Court to the particular case before it and to any change in circumstances. No single one of those legislative virtues can be claimed for the Act at bar.

Although we are not here concerned with the "contract" clause of the Constitution, but only with the "due process" clause of the Fifth Amendment, the test of reasonableness is practically the same under the "contract" clause and under the "due process" clause of the Fifth and Fourteenth

Amendments. (*Block* v. *Hirsh*, 256 U. S. 135; *Marcus Brown Holding Company* v. *Feldman*, 256 U. S. 170; *Levy Leasing Company* v. *Siegel*, 258 U. S. 242; *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393; *In re Bradford*, 7 F. Supp. 665.)

Section 75 and Section 75 (s) of the Bankruptcy Act do not contain a declaration of an existing emergency and the operation of the Frazier-Lemke Act is not limited to the duration of any emergency.*

Section 75 (c) limits the time for filing a petition under Section 75 [applicable also to § 75 (s)] to five years, i. e. March 3, 1938; to this period must be added the five or the six-year stay. Thus the provisions of the Act may well be operating for a good ten years unless sooner repealed or declared unconstitutional. The Act can not be regarded as "temporary" in the sense attributed to this word in prior cases advancing the "emergency doctrine". (See *Block* v. *Hirsh*, 256 U. S. 135; *Marcus Brown Holding Company* v. *Feldman*, 256 U. S. 170; *Levy Leasing Company* v. *Siegel*, 258 U. S. 242; *Home Building & Loan Association* v. *Blaisdell, supra; In re Bradford*, 7 F. Supp. 665.)

Nor can it be supported on the authority of *Chastelton Corp.* v. *Sinclair*, 264 U. S. 543, 547, 548, on the ground that the duration of the Act would cease with the expiration of the emergency. No power whatever is vested in any court to determine when, if ever, the emergency has passed. The

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* The emergency which motivated the decision in the *Blaisdell* case has been alleviated by that very decision. To date 29 States (see Appendix B for a summary of these laws), have enacted mortgage moratorium laws. These laws, as a whole, do not discriminate between classes of mortgagors, but grant relief to non-farmers as well as to farmers.

In addition to these state moratoria, the Federal government has passed many laws which have already lessened the distress of the farmer in general and the farmer-mortgagor in particular. W. I. Meyers, Governor of the Farm Credit Administration, stated that the activities of that agency "will obviate any extensive need for resort to the bankruptcy provisions of the Frazier-Lemke Act" (1934), 10 A. B. Rev., 364.

doctrine of the decisions in *Wilson* v. *New*, 243 U. S. 332, and in the *Rent Cases, supra*, which were declared to approach "the verge of the law" (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416), would certainly overstep even that extreme if applied to a Statute like this.

As this Court said, in holding unconstitutional the Arkansas exemption statute, "the legislation was not limited to the emergency and set up no conditions apposite to emergency relief", *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 432.

CONCLUSION.

The decree below should be reversed.

Respectfully submitted,

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March 27, 1935.

APPENDIX A

The Material Provisions of Section 75 of the Bankruptcy Act as Amended by the Frazier-Lemke Act.

SEC. 75. AGRICULTURAL COMPOSITIONS AND EXTENSIONS.

* * *

(c) At any time within five years after this section takes effect [March 3, 1933] a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. The petition or answer of the farmer shall be accompanied by his schedules. * * *

(r) For the purpose of this section and section 74, the term "farmer" means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such farming operations occur.

[THE FRAZIER-LEMKE ACT]

AN ACT

To amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 75 of the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States", as amended, is amended as follows: In

section 75, entitled "Agricultural Compositions and Extensions", after subsection (r) add a new subsection (s), to read as follows:

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition or extension proposal, or if he feels aggrieved by the composition or extension, may amend his petition or answer asking to be adjudged a bankrupt. Such farmer may, at the time of the first hearing, petition the court that all of his property, whether pledged, encumbered, or unencumbered, by liens or otherwise, be appraised, and that his exemptions as prescribed by the State law, subject to any liens thereon, be set aside and that he be allowed to retain possession of any part or parcel or all of the remainder of his property and pay for same under the terms and conditions set forth in this subsection (s).

"(1) Upon such a request being made in the petition or answer, at the time of the first hearing, appraisers shall be designated and appointed. Such appraisers shall appraise all the property of the debtor at its then fair and reasonable value, not necessarily the market value at the time of such appraisal. The appraisals shall be made in all other respects, with right of objections, exceptions, and appeal, in accordance with this Act: *Provided,* That in case of real estate either party may file objections, exceptions, and appeals within one year from date of order approving the appraisal.

"(2) After the value of the debtor's property shall have been fixed by the appraisal as herein provided, the referee shall issue an order setting aside to such debtor his exemptions as prescribed by the State law, subject to any existing mortgages or liens upon any such exemptions to an amount

equal to the value, as fixed by the appraisal, of the value of such exempt property as is covered by any mortgage or lien, and shall further order that the possession, under the control of the court, of any part or parcel or all of the remainder of the debtor's property, shall remain in the debtor subject to a general lien, as security for the payment of the value thereof to the trustee of the creditors, if a trustee is appointed, such a lien to be subject to and inferior to all prior liens, pledges, or encumbrances. Such prior liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such prior liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors holding such prior liens, pledges, or encumbrances up to the actual value of such property as fixed by the appraisal provided for herein. All liens herein on livestock shall cover all increase, and all liens on real property shall cover all rental received or crops grown thereon by the debtor, as security for the payment of any sum that may be due or past due under the terms and provisions of the next paragraph, until the full value of any such particular property has been paid.

"(3) Upon request of the debtor, and with the consent of the lien holder or lien holders, the trustee, after the order is made setting aside to the debtor his exemptions, shall agree to sell to the debtor any part, parcel, or all of the remainder of the bankrupt estate at the appraised value upon the following terms and conditions, and upon such other conditions as in the judgment of the trustee shall be fair and equitable:

"a. Payment of 1 per centum interest upon the appraised price within one year from the date of said agreement.

"b. Payment of 2½ per centum of the appraised price within two years from the date of said agreement.

"c. Payment of an additional 2½ per centum of the appraised price within three years from the date of said agreement.

"d. Payment of an additional 5 per centum of the appraised price within four years from the date of said agreement.

"e. Payment of an additional 5 per centum of the appraised price within five years from the date of said agreement.

"f. Payment of the remaining unpaid balance of the appraised price within six years from the date of said agreement.

"Interest shall be paid on the appraised price and unpaid balances of the appraised price yearly as it accrues at the rate of 1 per centum per annum and all taxes shall be paid by the debtor.

"The proceeds of such payments on the appraised price and interest shall be paid to the lien holders as their interests may appear, and to the trustee of the unsecured creditors, as their interests may appear, if a trustee is appointed.

"(4) An agreement having been reached as provided in subsection (3), the debtor may consume or dispose of any part or parcel or all of said property whether covered by the general lien to the trustee, if a trustee is appointed, or subject to pledges or prior liens or encumbrances held by secured creditors, provided he pays the appraised value of such part or parcel or all, as the case may be, to the secured creditors, as their interests may appear, and the trustee of the unsecured creditors, as his interests may appear, if a trustee is appointed, or he may put up a bond approved by

the referee in bankruptcy that he will make payments, as provided for herein, of any property so consumed or disposed of.

"(5) In case the debtor fails to make any payments, as herein provided, to any or all of the secured creditors or to the trustee of the unsecured creditors, then such secured creditors or the trustee may proceed to enforce their pledge, lien, or encumbrances in accordance with law. It shall be the duty of the secured creditors and of the trustee of the unsecured creditors to discharge all liens of record in accordance with law, whenever the debtor has paid the appraised value of any part, parcel, or all of his property as herein provided.

"(6) Having complied with the provisions of subsection (3), the debtor may apply for his discharge as provided in this Act.

"(7) If any secured creditor of the debtor, affected thereby, shall file written objections to the manner of payments and distribution of debtor's property as herein provided for, then the court, after having set aside the debtor's exemptions as prescribed by the State law, shall stay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession; the first payment of such rental to be made within six months of the date of the order staying proceedings, such rental to be distributed among the secured and unsecured creditors, as their interests may appear, under the provisions of this Act. At the end of five years, or prior thereto, the debtor may pay into court the appraised price of the property of which he retains possession: *Provided,*

That upon request of any lien holder on real estate the court shall cause a reappraisal of such real estate and the debtor may then pay the reappraised price, if acceptable to the lien holder, into the court, otherwise the original appraisal price shall be paid into court and thereupon the court shall, by an order, turn over full possession and title of said property to the debtor and he may apply for his discharge as provided for by this Act: *Provided, however,* That the provisions of this Act shall apply only to debts existing at the time this Act becomes effective.

"If the debtor fails to comply with the provisions of this subection[1] the court may order the trustee to sell the property as provided in this Act."

Approved, June 28, 1934.

[1] So in original.

APPENDIX B.

Summary of State Mortgage Moratorium Laws.*

State	Statute Reference	Substance of Provision	Judicial Construction
Arizona	Chap. 29, Laws of 1933, approved and effective March 4, 1933.	(a) In pending or future real estate mortgage foreclosure suits, the court may order a two year continuance unless good cause to the contrary is shown.	
	Chap. 88, Laws of 1933, effective June 18, 1933.	(b) Plaintiff in foreclosure suit is not entitled to deficiency judgment unless he can prove that at the time the mortgage was executed the property was not of a value in excess of the amount remaining due.	
Arkansas	Laws of 1933, Act No. 21, effective February 9, 1933, as amended by H. B. 214, effective Feb. 18, 1935.	Answer in suits to foreclose mortgages, deeds of trust or pledges executed prior to January 1, 1933, shall not be due until 8 months of service of summons; in fixing date of sale and confirming sale court shall consider the condition of the debtor, economic conditions, and the fair price for the property. None of the provisions of this act shall apply to mortgages, deeds of trust or other liens executed subsequent to January, 1933, whether same secure the payment of indebtedness incurred after said last named date or prior thereto and whether such indebtedness be a renewed or extended or newly created indebtedness or otherwise. (See next column)	
	Laws of 1933, Act. No. 57, effective February 25, 1933.		*Adams v. Spillyards* (Ark. 1933) 61 S. W. (2d) 686, held unconstitutional Act No. 57, which abolished deficiency judgments by requiring that the mortgagee bid the amount of the loan plus interest and costs, or the fair value of the property if the value was more than the loan.
California	Chap. 268, Laws of 1933, effective, May 9, 1933. Chap. 1057, Laws of 1933, effective Aug. 29, 1933.	(a) Prohibits until January 1, 1934, sales under a power of sale in a mortgage or deed of trust or decree of foreclosure of real property improved with a single family dwelling, in cases	

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* Excerpt from Commerce Clearing House. Bank Law Federal Service—"L" Unit—128 C. C. H., pages 7802-7809.

Summary of State Mortgage Moratorium Laws *(Continued)*.

State	Statute Reference	Substance of Provision	Judicial Construction
		where default in payment of the principal only exists.	
California *(Cont.)*	Chap. 798, Laws of 1933, effective Aug. 21, 1933.	(b) Deficiency judgments after foreclosure limited to the amount by which the debt exceeds the fair market value of the property.	
	Chap. 1, Laws of 1934, effective Sept. 15, 1934.	(c) Prohibits until February 1, 1935, sales under certain mortgages and deeds of trust, except mining property and the forfeiture of vendee's interest under certain contracts of purchase, for default in payment of principal only. Permits avoidance of sale or forfeiture and postpones sales for default of installment payments due between effective date and February 1, 1935.	
Delaware	H. B. No. 5, First Spec. Sess., 1933, effective Dec. 18, 1933, expires March 1, 1935.	Execution process against real estate may be stayed for six months.	
Idaho	Chap. 150, Laws of 1933, effective March 10, 1933.	(a) Deficiency judgments in an amount greater than the difference between the debt and the reasonable value of the property forbidden.	
	Chap. 124, Laws of 1933, effective March 2, 1933.	(b) Until Dec. 31, 1934, Governor is authorized to declare legal holidays limited to certain businesses and activities for not longer than 60 days renewable for periods of 60 days.	Proclamation of Governor suspending real estate mortgage foreclosures held unconstitutional in *Alliance Trust Co. v. Hall*, U. S. Dist. Ct., Idaho, Dec. 7, 1933.
	Proclamation of Governor, July 18, 1934, effective from midnight until September 15, 1934.	Legal holidays with respect to (1) Foreclosure of mortgages upon real estate and (2) Foreclosure or cancellation of contracts for the sale of real estate. District courts and judges empowered and authorized to suspend any or all proceedings of above nature upon application of any defendant in any such action.	
Illinois	Laws of 1933, p. 649, effective May 11, 1933; expires midnight, June 30, 1935.	The Governor, or the Superintendent of Insurance with the approval of the Governor, may stay foreclosures, or extend time for the payment of	

Summary of State Mortgage Moratorium Laws *(Continued)*.

State	Statute Reference	Substance of Provision	Judicial Construction
Illinois (Cont.)		mortgage debts on farms or homesteads where the mortgage is owned by an insurance company.	
Iowa	(a) Acts of 1933, Chap. 179, effective March 18, 1933; expires March 1, 1935, but see (d) below. (b) Acts of 1933, Chap. 182, effective February 9, 1933; expires March 1, 1935, but see (d) below. (c) H. B. 357, First Special Session, Laws of 1933, approved March 12, 1934, and effective on publication. (d) Acts of 1935, S. B. 24, approved February 4, 1935, effective on publication; expires March 1, 1937. (e) S. B. 59, Laws of 1935, approved February 20, 1935, effective on publication; expires March 1, 1937.	(a) Redemption period extended until March 1, 1935, in foreclosure actions where redemption period has not expired. (b) In pending or future suits for the foreclosure of real estate mortgages or deeds of trust, the court may order a continuance until March 1, 1935, unless good cause to the contrary is shown. (c) None of the provisions of Chaps. 179 and 182, Laws of 1933 (see (a) and (b) above) shall apply to mortgages made on and after Jan. 1, 1934. (d) In pending or future suits for the foreclosure of real estate mortgages or deeds of trust, the court may order a continuance until March 1, 1937, unless good cause to the contrary is shown. Applications under Acts of 1933, Chap. 182, shall be considered refiled under this Act. The Act does not apply to mortgages or deeds of trust executed subsequent to January 1, 1934, nor where the real estate was acquired subsequent to such date unless continuance has been granted under Acts of 1933, Chap. 182. (e) Any actions on land contracts executed prior to January 1, 1934, wherein the vendor has retained legal title, may be suspended until March 1, 1937, unless good cause to the contrary be shown.	(a) This act is constitutional on authority of *Home Bldg. & Loan Assoc. v. Blaisdell*, 54 S. Ct. 231.—*Des Moines Joint Stock Land Bank v. Nordham*, 217 Iowa 1319, 253 N. W. 701.

Summary of State Mortgage Moratorium Laws *(Continued)*.

State	Statute Reference	Substance of Provision	Judicial Construction
Iowa *(Cont.)*		Within thirty days after service of notice of forfeiture, a suspension of proceedings may be obtained abating the action until March 1, 1937, unless good cause to the contrary be shown.	
Kansas	Laws of 1933, Chap. 282, effective March 20, 1933.	(a) Period of redemption extended for six months after March 4, 1933. Governor may extend the moratorium for six more months if the emergency still exists. On September 6, 1933, the Governor extended the moratorium for another six months.	This Act is unconstitutional in extending a moratorium until Sept. 4, 1933.—*Lingerfelt v. Hieronimus*, Dist. Ct., Reno County, July 19, 1933; *Phoenix Mutual Life Ins. Co. v. Miller*, Dist. Ct., Labette County, July 29, 1933; *Oakland State Bank v. Bolin et al.*, Kan. Sup. Ct., Jan. 16, 1935.
	H. B. 290, Laws of 1935, effective March 1, 1935.	(b) The period of redemption, as extended under Chap. 3, Special Session Laws of 1934, may be further extended until January 15, 1937. Prior to January 15, 1937 no deficiency judgment shall be enforced until the period of redemption as allowed by existing law or as extended by this act has expired.	The moratorium as extended by the Governor for an additional 6 months was held unconstitutional by the Wyandotte Dist. Ct., in *McDonnell v. Cannavan* on Oct. 20, 1933.
	Laws of 1933, Chap. 218, effective March 7, 1933.	(c) Court may decline to confirm a sale in foreclosure where bid is inadequate, or court may fix an upset price at which property must be bid in if sale is to be confirmed.	Act of March 2, 1934 was held unconstitutional by U. S. District Court in *Phoenix Joint Stock Land Bank of Kansas City v. Dewey et al.*, 2 F. Supp. 678.
Louisiana	Laws of 1934, Act No. 28, effective Aug. 1, 1934.	Right to deficiency judgments is abolished where creditor provokes a judicial sale without the benefit of appraisement. Applicable both to real and personal property, and only to obligations made after this Act becomes effective.	
	Laws of 1934, Act No. 159, effective Aug. 1, 1934.	Until the second Monday in May, 1936 the District Court may postpone foreclosure sales on petition of the mortgagor or owner in possession. Mortgagor may be directed to pay rental or income value of land for the payment of taxes, insurance, interest, etc. The Act applies only to	

Summary of State Mortgage Moratorium Laws *(Continued)*.

State	Statute Reference	Substance of Provision	Judicial Construction
Louisiana *(Cont.)*		mortgages made prior to the approval of the Act.	
	Laws of 1934, H. B. No. 2, Second Special Session, effective December 6, 1934.	Bank Commissioner constituted, ex officio, the Debt Moratorium Commissioner. Under rules and regulations prescribed and published in official journal, Commissioner may, after hearing, suspend all laws or parts of laws relative to the enforcement of any debt (as defined in the act), public or private, except as specifically exempted by the act, and all laws or parts of laws authorizing the reduction of any debt to judgment or the enforcement thereof, for such period as seems just and proper in each case, but not beyond 12 o'clock noon on the 20th day after adjournment of the regular session of the Legislature for the year 1936. The Act has no effect on suspensions under Act No. 159 and applies only to debts existing prior to the passage of the Act when not subsequently extended or renewed for a period ending subsequent to December 6, 1935.	
Michigan	Acts 1933, Pub. Act No. 88, effective June 2, 1933; expires March 1, 1935, as amended by Pub. Act No. 20, Acts, 1934, effective March 28, 1934.	(a) Pending or future actions for the foreclosure of real estate mortgages or deeds of trust or for the specific performance of land contracts may be continued until not later than March 1, 1935, upon good cause shown. Foreclosures by advertisement may be brought into court and continued. The redemptive period may be extended in mortgages already foreclosed.	(a) This act is constitutional on authority of *Home Bldg. & Loan Assoc. v. Blaisdell*, 54 S. Ct. 231.—*Russell v. Battle Creek Lumber Co.*, 252 N. W. 561. Construed in *Young v. Union Joint Stock Land Bank*, 253 N. W. 225, and in *Virginian Joint Stock Land Bank v. Hudson*, 254 N. W. 234; *Daugherty v. Reading*, 254 N. W. 189.
	Acts 1933, Pub. Act No. 229, effective July 6, 1933.	(b) Court may fix minimum price at which land is sold at foreclosure.	
Minnesota	Laws of 1933, Chap. 339, effective April 8, 1933; expires, May 1, 1935.	Court may extend the time of redemption from mortgage foreclosure sales and execution sales of real estate, the power of sale by advertise-	United States Supreme Court held this provision constitutional in *Home Bldg. & Loan Assoc. v. Blaisdell*, 54 S. Ct. 231.

Summary of State Mortgage Moratorium Laws *(Continued)*.

State	Statute Reference	Substance of Provision	Judicial Construction
Minnesota *(Cont.)*		ment, and the right to deficiency judgments until May 1, 1935.	In *Grace v. Lichtscheidl*, 249 N. W. 672, the Minnesota Supreme Court held that the fact that the property mortgaged was not the homestead of the mortgagors would not make the law invalid in extending the period of redemption.
Mississippi	Laws of 1934, H. B. 270, effective April 4, 1934; expires May 1, 1935.	In suits to foreclose mortgages and deeds of trust executed after March 4, 1933 the court shall fix an "upset" price and shall direct the mortgagor to pay all or a portion of the rental value of the premises to the mortgagee for a term not to exceed two years after which the property may be sold. If any mortgagee shall attempt to foreclose otherwise than as herein provided, mortgagor may enjoin such proceeding provided he shows that he has sought to refinance his mortgage through some Federal agency.	
Montana	Laws of 1933, Chap. 116, effective, March 14, 1933. Laws of 1935, H. B. 16, effective February 6, 1935.	(a) In pending or future mortgage foreclosure actions, the court may stay proceedings for a period not to extend beyond March 1, 1935. (b) In actions for foreclosure of mortgages for balance of purchase price of real property, deficiency judgments are abolished.	
Nebraska	Laws of 1935, H. B. 1, effective February 27, 1935, amending and repealing Sections 20-21,159 and 20-21,161, C. S. Supp. 1933; expires midnight, March 1, 1937. Laws of 1933, H. B. 10, effective April 26, 1933. (Sec. 20-2141, C. S. Supp. Neb.)	(a) In pending or future actions to foreclose mortgage, deeds of trust, land sale contracts, or notes, the court may stay all further proceedings therein until March 1, 1937. (b) In actions for the foreclosure of real estate mortgages, deficiency judgments are abolished.	

Summary of State Mortgage Moratorium Laws *(Continued)*.

State	Statute Reference	Substance of Provision	Judicial Construction
New Hampshire	Laws of 1933, Chap. 161, effective June 15, 1933; expires within 2 years or until the Governor proclaims the emergency ended.	Sales in foreclosure actions may be suspended for a reasonable period. The redemptive period may be extended for a reasonable period.	
New Jersey	Laws of 1933, Chap. 82, effective March 29, 1933.	(See next column.)	*Vanderbilt v. Brunton Piano Co.*, 169 A. 177, held unconstitutional the provision allowing the mortgagor when sued on a deficiency judgment to raise the issue of the fair market value of the premises.
New York	Laws of 1933, Chap. 798, effective, August 26, 1933. Period of emergency extended to July 1, 1935 by Chap. 278, Laws of 1934, and further extended to July 1, 1936 by Chap. 1, Laws of 1935, effective Jan. 18, 1935.	(a) No action to foreclose a real property mortgage for default in payment of principal, no action on any loan secured thereby or any guaranty thereof may be brought until July 1, 1936. Applies also to participation mortgages and mortgage bonds. Pending actions shall be dismissed.	(a) *McCarty v. Prudence-Bonds Corp.*, 266 N. Y. S. 269, held this provision constitutional.
	Laws of 1933, Chap. 794, effective Aug. 28, 1933. Period of emergency extended until July 1, 1935 by Chap. 277, Laws of 1934, and further extended to July 1, 1936 by Chap. 2, Laws of 1935, effective Jan. 18, 1935.	(b) Deficiency judgments after foreclosure shall be based upon the fair and reasonable market value of the mortgaged premises during period of emergency which extends to July 1, 1936.	(b) *R. E. Co-op. Bldg. & L. Ass'n v. Boston Bldg. Est.*, 267 N. Y. S. 204, held this provision inapplicable to sales occurring before law became effective.
North Carolina	Laws of 1933, H. B. No. 1458, effective May 18, 1933; S. B. 135, effective Feb. 28, 1933, for two years; H. B. 1287, effective Ap. 24, 1933, and H. B. 1169, effective May 12, 1933.	(a) Court may continue foreclosure actions on mortgages and deeds of trust for one year. This power exists only for two years and only in Harnett, Lenoir, Macon, Haywood, Jackson, Cherokee, Graham and Swaine Counties.	

Summary of State Mortgage Moratorium Laws *(Continued)*.

State	Statute Reference	Substance of Provision	Judicial Construction
North Carolina *(Cont.)*	Laws of 1933, Chap. 26, effective Feb. 6, 1933.	(b) Deficiency judgments abolished in foreclosures and sales under powers of sale in purchase money mortgages and deeds of trust.	
	Laws of 1933, Chap. 275, effective April 18, 1933.	(c) Procedure set up to guarantee sale of property for fair price on foreclosure.	
		(See next column.)	
North Dakota	Laws of 1933, Chap. 157, effective February 21, 1933, expires at end of two years.	On March 20, 1934, the Governor issued a proclamation making it unlawful to oust an owner from his farm home lost through foreclosure without allowing the owner an opportunity to secure the benefits of federal legislation.	*State ex rel. Cleverinque v. Klein* (N. D. 1933) 249 N. W. 118, held the statute which extended the period of redemption for a period of two years unconstitutional as applied to mortgages executed prior to its passage.
	Laws of 1933, Chap. 155, effective March 7, 1933.	Courts may not grant deficiency judgments.	
	Proclamation of Acting Governor, July 25, 1934, effective until revoked.	Real or personal property of citizen residing in state can not be seized, levied upon or sold through use of force, stealth or process of law. No person can be evicted from home, place of dwelling or business for inability of debtor to pay. No foreclosure or deprivation of property or title thereto by tax, distress, levy or issuance of tax or sheriff's deed. Does not apply to obligation due to or security held by Federal Government or agency thereof. Review may be had by applying to judge of district court having jurisdiction.	
	Supplement to Debt Moratorium—Proclamation of Acting Governor, August 3, 1934.	Purpose of moratorium is to secure and preserve to debtor the possession and use of his property for a reasonable time during which the debtor may himself file petition for relief under Frazier-Lemke Act.	
		The moratorium has no application to seizure or sale by creditors of non-residents, property taken with consent of debtor or abandoned property and shall apply only to debts existing on June 29, 1934.	

Summary of State Mortgage Moratorium Laws *(Continued)*.

State	Statute Reference	Substance of Provision	Judicial Construction
Ohio	Regular Session, 1933, H. B. 30 amending section 11588 of the General Code, as amended by H. B. 144 (Dec. 12, 1934); repealing section 11588 of the General Code as amended by H. B. 219 (May 15, 1933), and H. B. 144 (Dec. 12, 1934); effective February 4, 1935.	Proceedings to foreclose a mortgage or enforce a specific lien may be postponed not later than April 1, 1937. This act applies only to mortgages executed prior to May 18, 1933.	
Oklahoma	Laws of 1933, Chap. 16, effective March 7, 1933; expires at end of two years.	(a) In pending or future actions for foreclosure of mortgages or other liens upon real estate defendant shall not be required to answer until the expiration of 9 months from service of summons, or if answer has been filed no trial shall be had for 9 months. (b) For two years after the approval of the Act, the court is vested with discretion of granting a continuance.	(a) The Act is unconstitutional as it affects actions pending at its effective date.—*State ex rel. Osage County Savings & Loan Assn. v. Worten*, 29 P. (2d) 1. (b) The Act is constitutional insofar as it allows judicial discretion in the granting of continuances; but it is unconstitutional in an arbitrary and capricious extension of time for 9 months in all cases.—*State ex rel. Roth v. Waterfield*, 29 P. (2d) 24. Rehearing denied, 29 P. (2d) 24.
Oregon	Regular Session, 1933, H. J. Res. 18, effective March 2, 1933.	Legislature by a Joint Resolution advises courts of equity not to decree foreclosure where the mortgagor is making a bona fide effort to pay.	
Pennsylvania	P. L. 827, Act of May 18, 1933, effective May 18, 1933, to continue in force until March 31, 1935. Act No. 59, Laws of 1933, effective Jan. 17, 1934, to continue in force until July 1, 1935.	(a) Court of common pleas shall have power to stay writs of execution for the sale of dwellings or farms to prevent serious inequity. (b) Procedure to determine fair value of property sold at foreclosure set up.	

Summary of State Mortgage Moratorium Laws *(Continued)*.

State	Statute Reference	Substance of Provision	Judicial Construction
South Carolina	Laws of 1933, S. B. 174, effective May 2, 1933.	(a) Deficiency judgment of court shall be based on the true value of the property as found by a board of appraisal.	
	Laws of 1934, S. B. 1078, effective March 2, 1934, expires after two years.	(b) Courts are empowered to stay foreclosure suits. Board of conciliation appointed to effect settlements in mortgage cases.	
South Dakota	Laws of 1933, Chap. 185, effective March 11, 1933.	(a) Foreclosures by advertisement suspended when requested by mortgagor.	(a) *State ex rel. Northwestern Mutual Ins. Co. v. Circuit Ct.*, 249 N. W. 631, held this provision valid.
	Laws of 1933, Chap. 187, effective June 2, 1933.	(b) Redemption period extended additional year on condition that the mortgagor pay taxes, back interest and costs.	
	Laws of 1933, Chap. 128, effective May 28, 1935, as amended by Laws of 1935, H. B. 109, effective February 27, 1935.	(c) Deficiency judgments abolished in foreclosure of purchase money mortgages.	
	Laws of 1935, H. B. 20, effective March 2, 1935.	(d) The mortgagor may file a petition with the Circuit Court prior to the expiration of the normal redemption period, and secure an extension of such period to not later than March 1, 1937. The Act does not apply to mortgages held by the State, the United States, or agency, to obligations guaranteed by the United States, or to mortgages held as security for a public debt or deposit.	
Texas	Laws of 1933, Chap. 102, effective May 1, 1933; expires after 200 days.	(a) Court may grant stays of proceedings in suits for the recovery of real property or foreclosure of liens or mortgages on real property filed within 180 days from the effective date of the Act or pending when the Act becomes effective. The extension shall last for 180 days, but the court may upon further application at the end of the first extension period, but not after 200 days from the effective date of the Act, grant further extensions but not beyond May 1, 1934.	(a) The Act is unconstitutional in that it impairs the obligation of contracts executed before its effective date.—*Life Ins. Co. of Va. v. Sanders*, (Tex. Ct. of Civil App., El Paso Div. 62 S. W. (2d) 348. The Act is constitutional in extending the time for the sale of land under a deed of trust.—*Lingo Lumber Co. v. Hayes*, 64 S. W. (2d) 835.

Summary of State Mortgage Moratorium Laws *(Concluded)*.

State	Statute Reference	Substance of Provision	Judicial Construction
Texas (Cont.)	S. B. No. 8, Second Spec. Sess., 1934, effective Feb. 28, 1934, expires Feb. 1, 1935.	(b) Court may grant continuances and stays of execution until Feb. 1, 1935.	The Act is unconstitutional.—*Murphy* v. *Phillips*, 63 S. W. (2d) 404. Rehearing denied Oct. 4, 1933; *contra*, *Beaumont Petroleum Syndicate* v. *Brossard*, Texas Ct. of Civil App., 9th Dist., Nov. 2, 1933.
	Laws of 1933, Chap. 92, effective April 21, 1933.	(c) In suits to collect deficiency judgments rendered after foreclosures, defendant may plead as a defense that the property was sold for less than its actual value, and actual value may be shown.	(b) The "Moratorium Act" violates Sec. 16 of Art. I of the Constitution of Texas, which prohibits the enactment of laws impairing the obligation of contracts.—*Travelers Insurance Company et al.* v. *Marshall et al.*, 76 S. W. (2d) 1007. (c) The Anti-Deficiency Judgment Law violates Sec. 16, Art. I, of the Constitution, which prohibits legislation impairing the obligation of contracts.—*Langever* v. *Miller*, 76 S. W. (2d) 1026.
Vermont	Laws of 1933, No. 80, effective March 24, 1933; expires March 1, 1935, unless by joint resolution or proclamation of the Governor the emergency is considered terminated.	Court may stay execution or foreclosure sales for three months; period of redemption may be extended in discretion of the court for the benefit of parties concerned.	
Wisconsin	Laws of 1933, Chap. 11, effective February 17, 1933. Chap. 474, effective July 29, 1933.	In any farm or homestead foreclosure action commenced prior to March 1, 1935, the court may direct that no sale be made until the expiration of a reasonable period not to exceed 2 years beyond the usual one year period, but not beyond March 1, 1938. In case of an existing judgment, a similar extension may be granted.	
	Laws of 1933, Chap. 18, effective Feb. 24, 1933.	Before sales in foreclosure up until Jan. 1, 1938, court shall exercise its equitable powers and fix the value of the mortgaged premises.	